

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM HOWE, ET AL.,

Plaintiffs,

vs.

Case No. 5:06CV2779

Akron, Ohio

Wednesday, December 10, 2008

CITY OF AKRON,

Defendant.

TRANSCRIPT OF TRIAL
VOLUME 6, PAGES 1136 THROUGH 1325
BEFORE THE HONORABLE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Dennis R. Thompson
Christy B. Bishop
Thompson & Bishop
2719 Manchester Road
Akron, Ohio 44319
(330) 753-6874

Bruce B. Elfvin
Elfvin & Besser
4070 Mayfield Road
Cleveland, Ohio 44121
(216) 382-2500

For the Defendant: Patricia C. Ambrose-Rubright
Michael J. Defibaugh
City of Akron - Civil Division
161 South High Street, Suite 202
Akron, Ohio 44308
(330) 375-2030

Court Reporter: Caroline Mahnke, RMR, CRR
Lori A. Callahan, RMR, CRR
Federal Building & U.S. Courthouse
2 South Main Street, Suite 568
Akron, Ohio 44308
(330) 252-6021

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 WEDNESDAY MORNING SESSION, DECEMBER 10, 2008

2 (Jury in, 10:45.)

3 THE COURT: Counsel for the plaintiff, you may
4 call your next witness.

10:46:59 5 MR. THOMPSON: Dr. Kyle Brink, Your Honor.

6 THE COURT: Doctor, could you approach witness
7 stand here to my right, sir. Please remain standing while I
8 administer the oath or affirmation.

9 KYLE BRINK,

10:47:11 10 of lawful age, a witness called by the Plaintiffs,

11 being first duly placed under oath, was examined

12 and testified as follows:

13 THE COURT: Be seated in the witness stand, sir.

14 I have some instructions I would like to give you before we
10:47:34 15 proceed further.

16 Adjust the microphone so your testimony can be heard
17 by call the participants. If there is an objection to any
18 question, do not respond to the question until I rule on the
19 objection. If I sustain the objection, you will not answer
10:47:48 20 the question. Please wait until the attorneys complete
21 their questions before you begin to respond.

22 It's difficult for the court reporters, the listeners,
23 when two individuals are speaking at the same time.

24 Listen carefully to the questions. If the question
10:48:03 25 calls for a yes or no, respond if that fashion. Do not

1 volunteer any information not called for by the question.

2 Thank you for your cooperation.

3 Counsel, you may inquire.

4 MR. THOMPSON: Thank you, Your Honor.

10:48:17 5 DIRECT EXAMINATION OF KYLE BRINK

6 BY MR. THOMPSON:

7 Q. Dr. Brink, would you please introduce yourself to the
8 ladies and gentlemen of the jury?

9 A. My name is Dr. Kyle Brink.

10:48:25 10 Q. And, Dr. Brink, are you employed?

11 A. Yes, I am.

12 Q. And currently, where are you employed, sir?

13 A. At the personnel board of Jefferson County.

14 Q. And let's talk a little bit about your education.

10:48:40 15 Would you please describe for the jury your education after
16 high school?

17 A. Sure. I went to Grand Valley State University in
18 Michigan, and I received a Bachelor's degree in psychology.

19 My major was in psychology. My minor was a business. After
10:48:57 20 that I went to graduate school at University of Georgia
21 before I received a master's, as well as a doctor's degree
22 in industrial/organizational psychologist.

23 Q. For the court reporters, can you slow down a little
24 bit? You used some big words. Did you receive a Ph.D.?

10:49:13 25 A. Yes, I did.

1 Q. From where?

2 A. University of Georgia.

3 Q. What year was that awarded?

4 A. 2003.

10:49:18 5 Q. And that Ph.D., what is what field, sir?

6 A. Psychology.

7 Q. Explain to the jury, if you would, please, what
8 is -- I guess is industrial hyphen or slash?

9 A. Slash, either way.

10:49:38 10 Q. What is psychology?

11 A. It's a field of psychology that focuses primarily on
12 organizations. It's a lot like human resource field or
13 management type of field, but we focus a little more on
14 science and on the person than on finances and benefits.

10:49:56 15 So some of the areas of study for
16 industrial/organizational psychologist would include
17 training, selection, job analysis, compensation, studying
18 humans and organizations.

19 Q. And as part of your professional work in psychology,
10:50:17 20 have you conducted any research?

21 A. Yes, I have.

22 Q. And do you have your vitae in front of you?

23 MR. THOMPSON: I think you have it, Judge, as
24 Exhibit 143.

10:50:26 25 THE COURT: I do. Thank you.

1 Q. Using 143, Doctor, can you describe for the jury, if
2 you would, please, some of the research that you've been
3 involved with?

4 A. I've done some research at the personnel board in the
10:50:40 5 area of selection, and this is research that I presented at
6 conferences.

7 Q. Stop right there for a minute. Conferences? What
8 kind of conferences?

9 A. The Society for Industrial/Organizational Psychology.

10:50:56 10 Q. That's abbreviated SIOP?

11 A. SIOP, S-I-O-P.

12 Q. What other kind of conferences?

13 A. And SIOP is our professional organization -- we call
14 ourselves SIOP psychologists because industrial organization
10:51:10 15 gets a little long, but that's the industrial organization
16 for SIOP psychologists.

17 Q. And what papers have you presented?

18 A. I've had several. I chaired a symposium which is a
19 group of papers committed to a common theme related to
10:51:28 20 trying to balance maximizing diversity and validity,
21 sometimes they appear to be conflicting goals. We offer the
22 strategies where you can try to maximize both. That's one
23 example of a presentation.

24 Q. Any others?

10:51:45 25 A. Recently I chaired another symposium which again is a

1 collection of papers looking at the effects of time and test
2 validation.

3 There is a myth, an urban legend that's commonly held
4 that if you increase the amount of time that you give
10:52:00 5 applicants to take a test, that it can reduce --

6 MS. AMBROSE-RUBRIGHT: Objection.

7 THE COURT: Sustained.

8 Q. This symposium that you were talking about, just
9 addressing it, what was the subject matter of that
10:52:12 10 symposium?

11 A. The impact of time, length or test time on validity.

12 Q. Now, explain that to the jury, if you would, please.
13 Doctor, I think you were. This is just a prep question,
14 just, if you would, please, explain what that means?

10:52:33 15 A. Time or validity?

16 Q. What the subject of the symposium was?

17 A. Okay. We looked at whether or not time length,
18 whether it was short or long, would influence how valid a
19 test is and the extent to which group differences might
10:52:50 20 vary.

21 Q. And why was that interesting -- or why was that a
22 subject of interest to industrial organizational
23 psychologists?

24 A. This is a common held belief that if you increase the
10:53:03 25 amount of time you give to applicants to take a test, it may

1 level the playing field, so to speak, it may reduce group
2 differences.

3 However, we have shown, or at least our research has
4 shown this is not the case. The differences tend to remain
10:53:15 5 steady regardless of amount of time.

6 Q. So what you were doing is taking, I guess, a
7 hypotheses and testing a hypothesis?

8 MS. AMBROSE-RUBRIGHT: Objection.

9 THE COURT: Sustained. Disregard the question,
10:53:26 10 ladies and gentlemen.

11 Q. Was what you were doing hypothesis test?

12 A. Yes, it was.

13 Q. And the hypothesis was, sir?

14 A. The hypothesis we were testing is does time have an
10:53:44 15 impact on group differences.

16 Q. And for the jury's benefit, describe what a hypothesis
17 is?

18 A. A hypothesis is a theory or idea that a researcher
19 would propose based on prior research, prior theory, they
10:54:03 20 would come up with a hypothesis which is simply a research
21 question. A hypothesis might be does smoking cause cancer.

22 But once you have a hypothesis, you would collect
23 data, and would you analyze that data to try and determine
24 whether or not that hypothesis was correct.

10:54:17 25 Q. Is that what is known as hypothesis testing?

1 A. That's correct.

2 Q. Dr. Brink, you said you were employed by the Jefferson
3 County Personnel Board. Jefferson County is where?

4 A. Birmingham, Alabama is within Jefferson County.

10:54:38 5 Q. And how long have you been there, sir?

6 A. Five and a half years.

7 Q. And what do you do there?

8 A. My job title is IO psychologist. And I supervise a
9 team of currently four employees, and my responsibilities or
10:54:55 10 my team's responsibilities are to study jobs, conduct job
11 analyses is the term that we use, develop minimum
12 qualifications for jobs, we announce jobs, screen
13 applicants, and we also develop and validate selection tools
14 that are used to hire the applicants or candidates.

10:55:17 15 Q. Why did you take the job at Jefferson County Personnel
16 Board?

17 MS. AMBROSE-RUBRIGHT: Objection.

18 THE COURT: It's overruled.

19 Q. Go ahead. You can answer.

10:55:28 20 A. The reason I wanted to go to Jefferson County was
21 because it was a unique opportunities. They were currently
22 under a consent decree at that time, and this was an
23 opportunity to have a real impact on the organization. It
24 was a very broken organization and it was a chance for me to
10:55:45 25 use my skills to help make some real impacts there.

1 Q. When you say they were under a consent decree, explain
2 to the jury what that is?

3 MS. AMBROSE-RUBRIGHT: Objection.

4 THE COURT: I'll allow it. Go ahead. Ladies and
10:55:56 5 gentlemen, there is no issue -- there is no consent decree
6 at issue in this case. What this witness is describing to
7 you is his background, experience, what took him to come to
8 work, as I understand it, at his current position or
9 employment. You are to draw no inference from the fact that
10:56:14 10 in this case -- or in his circumstance, there is some form
11 of consent decree. No consent decree at issue in this
12 matter. With that instruction, counsel, go ahead.

13 A. A consent decree, as I understand it, is --

14 THE COURT: Wait a minute. Back up. Why don't
10:56:33 15 you ask him if he knows and understand what a consent decree
16 is first as a predicate?

17 Q. Do you know what the consent decree was to Jefferson
18 County Personnel Board?

19 A. Yes.

10:56:47 20 Q. Describe to the jury?

21 A. Due to the use of invalid selection procedures, and
22 the inability to change that and actually develop valid
23 selection procedures, the Court established oversight over
24 the personnel board to ensure that they would begin to
10:57:04 25 develop procedures that are appropriate.

1 Q. The testing -- or the selection procedures that were
2 in use in Jefferson County prior to your being hired, did
3 they have what is known as an adverse impact?

4 A. Yes, they did.

10:57:22 5 Q. Explain that concept in the context of Jefferson
6 County to the jury, please.

7 A. You want me to explain what adverse impact is?

8 Q. Yes.

9 A. Adverse impact is when this is a difference in
10:57:36 10 selection rates between protected classes, protected classes
11 include sex, race, religion -- the ones that are of primary
12 interest most of the time include sex and race. So is there
13 a difference in selection rates, for example, between males
14 and females such that it adversely affects or impacts one of
10:57:57 15 those particular protected classes.

16 Q. Tell the jury, if you would, please, who it was that
17 actually hired you at County Personnel Board?

18 MS. AMBROSE-RUBRIGHT: Objection.

19 THE COURT: It's overruled.

10:58:07 20 Q. Go ahead.

21 A. I was hired by -- at the time the personnel board was
22 under receivership so I was hired by a receiver at the time.

23 Q. The receiver was appointed by whom?

24 A. The federal Judge presiding over the case.

10:58:23 25 THE COURT: Again, ladies and gentlemen, counsel

1 is referencing you by way of background information
2 pertaining to the Jefferson County position this individual,
3 this witness occupies. There is no consent decree. You
4 should draw no adverse inference from the facts and
10:58:47 5 circumstance giving rise to this witness's employment in
6 that jurisdiction. Counsel, next question.

7 Q. This is background information.

8 THE COURT: You can address it in summary
9 fashion. There is no consent decree in this case. I think
10:59:01 10 perhaps in addition, you should explain for the benefit of
11 the jurors, what a consent decree is, or if this witness
12 knows, let him explain or I'll give some instructions to
13 this jury as to what a consent decree is.

14 Q. Let me just ask a couple more questions.

10:59:21 15 THE COURT: Why don't we approach the side-bar,
16 counsel.

17 (Discussion at side-bar as follows:)

18 THE COURT: A consent decree is just that, an
19 agreement by the parties to allow the Court to appoint an
10:59:39 20 individual to supervise and put in place a plan to address
21 issues that are before this Court. Now, I'm not going to
22 you allow you to try to present to this jury information
23 that's prejudicial to the defendant, to mislead them into
24 believing that in some way, shape or form the circumstances
11:00:00 25 here are the same or identical to the circumstances in

1 Jefferson County. They are not. There is no consent
2 decree.

3 And so, there is no similar circumstances here, so
4 don't go there. You can lay your foundation as to his
11:00:17 5 qualifications, but don't try to compare Jefferson County to
6 Akron Fire and imply anything beyond that. And if that's
7 what you're attempting to do, I'm not going to allow it. I
8 don't want to do this in front.

9 MR. THOMPSON: I understand.

11:00:33 10 THE COURT: Establish his background and
11 experience and go from there. Thank you.

12 MR. THOMPSON: Thank you, Your Honor.

13 (The following proceedings were had in the hearing of
14 the Jury:)

11:00:46 15 Q. Dr. Brink, tell the jury how many job analyses you
16 have ever done since you have been in the industrial
17 organizational psychology field?

18 A. I don't know the exact number, but I've overseen over
19 200 job analysis.

11:01:00 20 Q. And in the County Personnel Board, the work that you
21 do there, does it involve safety force testing?

22 A. Yes, it does.

23 Q. And safety forces for the jury, please, are?

24 A. Police and fire.

11:01:12 25 Q. And over the course of your career, sir, how many

1 promotional examinations have you been involved with?

2 A. I don't know the exact number, but it would be dozens.

3 Q. When you say you were developing, have you been
4 involved in the development of these promotional
11:01:32 5 examinations, sir?

6 A. Yes, I have.

7 Q. What is involved, explain to the jury, if you would,
8 please, when you talk about developing an exam, what all is
9 involved in that, just in a brief spot and then we will
11:01:44 10 follow up?

11 A. Okay. Just a few steps to that process. The first
12 step could be conducting the job analysis, job analysis to
13 identify what is done on the job. Once you finish with the
14 job analysis, you identify what types of selection devices
11:02:03 15 you might want to use to measure the important aspects of
16 the job. Once you determine that plan, you would move
17 forward and actually develop the tools, whether it might be
18 an interview, a work sample, which is a simulation of the
19 actual type of work that people might perform, whatever that
11:02:21 20 device might be that you determine to be the most
21 appropriate.

22 Once you develop the test you, you would administer
23 the test to applicants or candidates. You would assess the
24 test appropriately, analyze the data, and that would pretty
11:02:35 25 much conclude the process once you compute scores and

1 analyze the data.

2 Q. There is a lot of work in all that process?

3 A. Yes.

4 Q. As part of the testing process that you use in
11:02:46 5 Jefferson County, do you use written job knowledge tests?

6 A. No, we he don't.

7 Q. Explain to the jury why not?

8 A. Written job knowledge tests tend to have higher
9 adverse impact. We try to avoid those types of tests

11:03:03 10 because of that. We feel like there is other methods that
11 can be used to test job knowledge and in more appropriate
12 ways, so we try to avoid job knowledge tests or we do avoid
13 job knowledge tests.

14 Q. So tell the jury, if you would, please, the
11:03:18 15 promotional examinations that you are involved with
16 developing and administering in Jefferson County, what is
17 the structure of those promotional examinations?

18 A. Our promotional exams are usually what are descried as
19 assessment centers. Assessment center is a selection
11:03:35 20 process that's usually comprised of multiple exercises. One
21 of the exercises might be, for example, writing a memo or
22 some other type of exercise. Another exercise might be
23 what's referred to as an in-basket exercise. And this is
24 sifting through memos -- these are mock memos, voice mails,
11:03:55 25 over things that you might have to address if you were in

1 fact on the job.

2 Sometimes we use role plays. Role play is just where
3 a training person would interact with a candidate to try and
4 solicit information. For example, a fictitious management
11:04:11 5 subordinate counseling session where the candidate would
6 have to try to demonstrate that management skills through
7 the fictitious counseling session. Those are just some
8 examples what you might use in an assessment center.

9 Q. Dr. Brink, in the assessment center exercises that you
11:04:27 10 are involved with in Jefferson County, are they recorded?

11 A. Yes, they are.

12 Q. Explain to the jury how that process is done, and I
13 know the court reporters are trying to take this all down so
14 try to keep it as basic as you can.

11:04:40 15 A. Sure. We record all of our assessments using video
16 cameras.

17 Q. When you record, do you have an actual site that you
18 do this with?

19 A. Yes.

11:04:53 20 Q. And the technology that you use, is this off the shelf
21 technology?

22 A. The technology?

23 Q. Yeah, the recording device, those things?

24 A. Yeah, just video cameras.

11:05:09 25 Q. That's it.

1 Are you familiar with the phrase publish or perish?

2 A. Yes.

3 Q. Do you have that pressure to publish what you do for
4 your profession?

11:05:23 5 A. No, I don't.

6 Q. Why is that?

7 A. Publishing is -- publish or perish comes from the
8 academic environment. There's requirements to publish often
9 to tenure. In my environment, there is not a requirement
11:05:38 10 for my job to publish. We are encouraged to do research.
11 That's why we try to do research and go to the conferences
12 to present the research. But I don't necessarily have to
13 publish. It doesn't -- I'm not rewarded in my job for
14 publishing.

11:05:54 15 MR. THOMPSON: Your Honor, we request that Dr.
16 Brink be qualified as an expert in psychology.

17 THE COURT: Any objection?

18 MS. AMBROSE-RUBRIGHT: Your Honor, we do have one
19 objection and that is to any testimony --

11:06:05 20 THE COURT: I'll allow the qualification of the
21 witness as an expert for certain portions of his testimony.
22 If you wish to object, you can object and I'll deal with it
23 at side-bar. Otherwise we can proceed the with the
24 examination of the witness.

11:06:19 25 MS. AMBROSE-RUBRIGHT: Thank you, Your Honor.

1 THE COURT: Go ahead counsel.

2 MR. THOMPSON: Thank you, Your Honor.

3 Q. Dr. Brink, tell the jury why you were retained by the
4 plaintiffs in this case?

11:06:28 5 A. I was asked to examine the selection procedures that
6 were used -- that were developed by E.B. Jacobs for the City
7 of Akron for fire lieutenant and fire captain. I was asked
8 to determine if there was adverse impact in those procedures
9 to determine if I thought those procedures were valid, and
11:06:49 10 also to determine if there was a search for alternative
11 measures that could have been used that would have resulted
12 in less adverse impact that would have been equally valid.

13 Q. And in performing those duties, what information did
14 you review or use in coming to your conclusions?

11:07:11 15 A. The validation report, including the appendices.

16 Q. Who prepared the validation report?

17 A. E.B. Jay.

18 Q. When you say E.B. Jay, who's that?

19 A. I'm not sure what E.B. Jay actually stands for, but
11:07:23 20 it's a consulting firm that's owned and operated by Dr.
21 Rick Jacobs.

22 Q. Are you familiar with the -- we talked about the final
23 report. Did you review anything else?

24 A. The final report, appendices, and as I was reviewing
11:07:44 25 that, I also looked at the uniform guidelines, which is a

1 form document that served as a guide to develop and validate
2 tests. I also looked at the SIOP principals which was
3 developed by my professional association, which again
4 specializes in the area of selection. The SIOP principles
11:08:04 5 are principles of test development and validation.

6 And I also looked at what's referred to as the APA
7 standards. The APA standards are developed by the broader
8 field of psychology, the American Psychological Association,
9 to guide testing in any environment.

11:08:21 10 So I reviewed those documents as well to refresh
11 myself with standards and guidelines that should be used
12 throughout validating a selection procedure.

13 Q. Did you have an opportunity to examine any of the data
14 sets for E.B. Jacobs relevant to these exams?

11:08:37 15 A. Yes, I did.

16 Q. Explain to the jury what a data set is?

17 A. A data set is simply a file that contains data
18 reflecting candidate responses. A candidate will go through
19 a selection procedure, assessors are assigned ratings,
11:08:54 20 scores, based on their responses in the selection procedure.
21 They'll enter that into a database, and that's what is used
22 to summarize all of the scores that were assigned to
23 applicants.

24 Q. Are you familiar with the term high stakes testing?

11:09:10 25 A. Yes, I am.

1 Q. How are you familiar with that term, Doctor?

2 A. It's a commonly used term in psychology.

3 Q. Explain to the jury what high stakes testing is?

4 MS. AMBROSE-RUBRIGHT: Objection.

11:09:25 5 THE COURT: It's overruled.

6 A. High stakes testing is a term that's usually used for
7 tests that really affect the well-being of the person that
8 is taking the test. Examples of high stakes testing would
9 be tests that are used for selecting or promoting

11:09:41 10 individuals for jobs, as well as, for example, ACT or SAT,
11 tests that would be used for college admission, as well as
12 certification exams that are given or licensure exams, those
13 are all examples of high stakes tests.

14 Q. These promotional examinations for the City of Akron
11:09:59 15 Division of Fire, would those fall within the category of
16 high stakes testing as you've just defined?

17 A. Yes.

18 Q. Describe for the jury, if you would, please,
19 Doctor -- and there is water up there, too, if you need it.

11:10:13 20 Describe for the jury, if you would, please, the
21 methodology that you took in analyzing the examinations in
22 issue in this case. What were the steps you went there?

23 A. I first went to adverse impact to see if it existed.
24 And once I found out that adverse impact existed, I started
11:10:36 25 just going through the validation report from start to

1 finish. Just to look at the entire process from start to
2 finish to evaluate whether or not I felt that it met the
3 guidelines, the three guidelines that I mentioned
4 previously.

11:10:49 5 Q. We talked about those. The uniform guidelines on
6 employee selection?

7 A. Correct.

8 Q. What are those?

9 A. The uniform guidelines are -- it's a set of guidelines
11:11:02 10 that was created in 1978, I believe. It was a joint effort
11 by the EEOC, the Department of Labor, the Department of
12 Justice, and one other federal agency. And these are
13 federal guidelines that are used to help employees or test
14 developers really know what they should be doing when they
11:11:23 15 develop and validate tests.

16 The guidelines outline also how you identify whether
17 or not adverse impact exists. Prior to this there was
18 really no guidelines that helped employers know whether or
19 not adverse impact existed. And this developed the
11:11:39 20 methodology for doing that.

21 Q. How does the field of industrial organizational
22 psychology use the uniform guidelines?

23 A. We use them as a guide for developing and validating
24 selection procedures. And by looking at the guidelines, you
11:12:00 25 can use them to determine whether or not your procedure is

1 valid. If you followed all the guidelines, you're more
2 likely able to conclude that your procedure is valid. If
3 you didn't follow any of them, you would conclude that your
4 test is invalid.

11:12:15 5 Q. And you mentioned the term adverse impact. We talked
6 about that a little before. And you just mentioned that
7 when you found adverse impact existed, then you started
8 looking at the exam, start to finish.

9 Tell the jury how you determined that an adverse
11:12:29 10 impact existed in this case?

11 A. There are several tests that are commonly use for
12 identifying whether or not adverse impact exists. One is
13 the impact ratio, and this is comparing selection rates of,
14 in this case, black candidates versus white candidates,
11:12:47 15 candidates over 40 versus candidates under 40. So the
16 adverse impact is a way to make that comparison -- excuse
17 me, four-fifths rule is a way to make that comparison.

18 Other tests that are used to look at adverse impact
19 include statistical tests, such as Fisher's Exact test,
11:13:08 20 Chi-square test, and a Z test of the impact ratio. And
21 there is also a practical rule of thumb that's outlined
22 again in the uniform guidelines that's referred to as the
23 flip-flop rule or the N-of-1 rule.

24 So I used all these methods to determine whether or
11:13:27 25 not adverse impact exists.

1 Q. We're going to start going through those one at a
2 time.

3 You already mentioned what four-fifths rule is. Did
4 you have the opportunity to review the data that the City of
11:13:39 5 Akron filed in briefs in this case?

6 A. At the time --

7 MS. AMBROSE-RUBRIGHT: Objection.

8 THE COURT: Why don't you restate the question,
9 is your. Rephrase the question.

11:13:50 10 MR. THOMPSON: Sure.

11 Q. Did you have an opportunity to review the charts
12 regarding selection and those that passed the exam or
13 completed the process, that the City of Akron presented to
14 the Court in this case?

11:14:04 15 A. Yes, I have.

16 Q. Did you have a chance to compute the impact ratio
17 based on the data that the City of Akron presented?

18 A. Yes, I did.

19 Q. Based on that observation, your own observation of the
11:14:18 20 City of Akron's data, did you have a conclusion that there
21 was an adverse impact on the basis of race for the rank of
22 lieutenant?

23 A. Yes.

24 Q. And that adverse impact was with reference to black
11:14:30 25 candidates or white candidates?

1 A. There was adverse impact against black candidates for
2 lieutenant.

3 Q. Again, using the same foundation, based on your review
4 of the data that the City of Akron presented to this Court,
11:14:44 5 did you compute the impact ratio relating to race at the
6 captain rank?

7 A. Yes.

8 Q. Were you able to compute that adverse impact?

9 A. Yes.

11:14:52 10 Q. Tell the jury what you found?

11 A. There was adverse impact against white candidates.

12 Q. And this is using four-fifths rule?

13 A. That's correct.

14 Q. Same set of questions relating to age at the rank of
11:15:05 15 lieutenant.

16 Using the City of Akron's data they presented to this
17 Court, were you able to compute the impact ratio as to age
18 at the rank of lieutenant?

19 A. Well, when I looked at the City of Akron's report, I
11:15:20 20 actually think there was an additional error or an addition
21 error in one of the tables. But once I corrected that, yes,
22 there was adverse impact.

23 Q. Again, using four-fifths rule?

24 A. That's correct.

11:15:31 25 Q. And when you say adverse impact, describe what you

1 mean adverse impact, as to which group?

2 A. There is adverse impact against candidates over the
3 age of 40.

4 Q. And at the rank of captain, were you able to compute,
11:15:44 5 using the data that the City of Akron presented to this
6 Court, were you able to compute the impact ratio as to
7 persons over 40 at the rank of captain?

8 A. Yes.

9 Q. And that was, sir?

11:15:55 10 A. There was adverse impact against candidates over the
11 age of 40.

12 MS. AMBROSE-RUBRIGHT: Objection.

13 THE COURT: It's overruled.

14 MS. AMBROSE-RUBRIGHT: Your Honor, may we
11:16:17 15 approach?

16 THE COURT: Yes.

17 (Discussion at side-bar as follows:)

18 THE COURT: Yes, counsel.

19 MS. AMBROSE-RUBRIGHT: Yes, Your Honor, in the
11:16:42 20 Centrus report, Dr. Brink has a conclusion that there is not
21 adverse impact on the captain's examination.

22 MR. THOMPSON: Using different data. The data is
23 based on what you represented in the summary judgment
24 briefs, and that's what I asked him about. The data you
11:16:57 25 presented to this Court as being what the promotion rates is

1 what he relied on for that opinion. If you look at the data
2 he has in there, he uses 33 as the total candidate base, not
3 41. That's based on the data he picked up from Jacobs
4 picking up the wrong number. So what he did is, if you look
11:17:14 5 at the data --

6 THE COURT: Slow down.

7 MR. THOMPSON: If you look at the data you
8 presented to the Court in the summary judgment brief which
9 is what he is testifying off of, there are also math errors
11:17:26 10 in the data you presented.

11 So what he did, he selected from those based on the
12 data you represented in the summary judgment brief and
13 that's what he is basing the opinion on.

14 MS. AMBROSE-RUBRIGHT: But it's not the data in
11:17:36 15 this examination.

16 MR. THOMPSON: It's the data we already
17 stipulated to today, and the testimony has been what applies
18 in this case. If you want to ask him on cross-examination,
19 feel free.

11:17:44 20 MS. AMBROSE-RUBRIGHT: No, Denny, I'm looking
21 here and he says -- this is his expert's report -- and it
22 says: Statistical tests were not run for age because
23 adverse impact was not observed based on the four-fifths
24 rule. And that is based on the data set.

11:17:59 25 If there is a chart in a brief that has some

1 typographical error, that does not mean --

2 MR. THOMPSON: The data you presented as to
3 promotion rates at captain are the data that we have already
4 agreed exist in this case. That's what that opinion is
11:18:13 5 based on. If you want to ask him about that during cross,
6 go right ahead.

7 MS. AMBROSE-RUBRIGHT: I still am not following
8 you. Is he basing it -- basing it on the data for captain
9 that exists in the case for over 40 and under 40?

11:18:27 10 MR. THOMPSON: Yes, based on what was represented
11 in the summary judgment brief and what we agreed in this
12 case.

13 MS. AMBROSE-RUBRIGHT: I'm not talking about the
14 brief.

11:18:33 15 MR. THOMPSON: It's what we agreed in this case
16 are the data. If you look at what he's got here, he's using
17 33 as the total overall population. The overall population
18 was 41. And the reason for that was the data he picked up
19 were the white selections -- white captains candidates for
11:18:47 20 captain. That was an error. What he is doing in his
21 opinion --

22 MS. AMBROSE-RUBRIGHT: This is the first time
23 that this has ever been presented. This has never -- he has
24 never talked about that.

11:18:57 25 MR. THOMPSON: The data is right there.

1 THE COURT: One at a time please.

2 He submitted a report -- I hate to go back to the
3 same. But I adopt and follow the same rule in every case,
4 and I will in this case.

11:19:08 5 Now, he submitted a written report outlining his
6 opinion. Counsel for the defendant is holding in her hand
7 the report. I can read it.

8 MS. AMBROSE-RUBRIGHT: It's the pink underline,
9 Your Honor.

11:19:22 10 THE COURT: Let me sort this out. It says:
11 Statistical tests were not run for age because adverse
12 impact was not observed based on four-fifths rule. This is
13 the report dated September 7, 2007. He is now rendering an
14 opinion that is different than that which is the forth in
11:19:39 15 his report. And why is that?

16 MR. THOMPSON: Because the date that he used -- I
17 can ask him that. But the data he used to compute that
18 there is the data that existed in this case based on what
19 was provided to him by Jacobs. He picked up the wrong
11:19:57 20 number as far as overall population of the captain rank.

21 THE COURT: So at some later time, did he --

22 MR. THOMPSON: He looked at their summary
23 judgment brief which we adopted as the data.

24 THE COURT: When you say adopted, is there some
11:20:08 25 stipulation in the record, some written agreement between

1 the parties that the data submitted in motion practice was
2 now the data upon which the experts are to base their
3 opinion?

4 MR. THOMPSON: In our summary judgment response
11:20:19 5 to that, we adopted their data and computed based on that
6 data.

7 MS. AMBROSE-RUBRIGHT: This is a circular --

8 THE COURT: One second.

9 So again, so I understand what's transpiring here, if
11:20:30 10 I can figure it out, your expert now has a different opinion
11 other than the opinion he previously set forth in his
12 written report under Rule 26 that was filed December 7? He
13 is now rendering a different opinion?

14 MR. THOMPSON: On that specific issue, yes.

11:20:48 15 THE COURT: And let me ask the question. Once
16 again, we will revisit the same issues we visited in the
17 past. Did you disclose to the opposing side that your
18 expert, whether it's based on information in the motion for
19 summary judgment or any other information, did you disclose
11:21:04 20 formally through a supplemental report that, in fact, your
21 expert now had a new opinion that he was going to be
22 rendering at trial? Yes or no?

23 MR. THOMPSON: The expert --

24 THE COURT: I --

11:21:21 25 MR. THOMPSON: I think his declaration did talk

1 about that.

2 MS. AMBROSE-RUBRIGHT: Denny, show me in the
3 declaration where it says that.

4 MR. THOMPSON: I said I think.

11:21:28 5 MS. AMBROSE-RUBRIGHT: This is the first time I
6 ever heard this, ever. This is not about --

7 THE COURT: Counsel, stop it right now. Stop it
8 right now. I'm telling you, both of you, I told you this
9 before and I'm telling you again, if he is rendering
11:21:40 10 opinions -- I'm about ready to impose a sanction, maybe
11 exclude this testimony, if you're allowing this witness to
12 come up here again and render opinions that have not been
13 fully disclosed or are different from what he has put in his
14 report without providing opposing counsel with a
11:21:59 15 supplemental report, then under the rule, I'm not sure what
16 sanction is appropriate.

17 Now, I'm not going to tolerate it. Maybe I need to
18 adjourn this jury and let you examine this witness outside
19 their presence in my presence to make sure I understand
11:22:15 20 exactly what it is he's going to testify to. It is not
21 compliance with the rule to say, oh, by the way we reviewed
22 some new information in the papers and he is rendering a new
23 opinion and not formally advising the other side of the
24 change. And that's what you seem to believe is the case,
11:22:34 25 and it's not appropriate. I'm not going to tolerate it.

1 If he is got any new opinions that are not rendered in
2 his report and they haven't been formally disclosed to the
3 other side as the rule requires, I'm not going to allow it,
4 and I'm going to strike it from the record.

11:22:51 5 MR. THOMPSON: I'll ask him if the opinion that
6 he has in his report is accurate.

7 THE COURT: No. This opinion will not be heard
8 by the jury because you haven't timely disclosed it and you
9 basically admitted to me you haven't.

11:23:02 10 MS. AMBROSE-RUBRIGHT: And, Denny, my experts
11 have an opportunity to review it if that is his opinion.

12 THE COURT: That's all.

13 (The following proceedings were had in the hearing of
14 the Jury:)

11:23:14 15 THE COURT: Ladies and gentlemen of the jury,
16 we're going to do the following. We are going to take a
17 break until I can address this issue outside your presence.
18 So that we can clarify certain issues in this matter.

19 My apologize, ladies and gentlemen, I'm sorry that I
11:23:35 20 have delay the proceedings this morning. My apologies that
21 I'm going to have to address this issue here this
22 afternoon -- excuse me, still this morning. Please adjourn
23 to the jury room. We will help you. We will make you
24 comfortable, and my apologies.

11:23:50 25 Please remember all the admonitions I've given you

1 about not discussing or expressing an opinion on the matter.
2 Thank, very much, ladies and gentlemen.

3 THE DEPUTY CLERK: All rise.

4 (Your out 11:25.)

11:24:23 5 THE COURT: I'm going to take five minutes to
6 decide exactly how I'm going to address this issue. Counsel
7 if you've got something to point me to in the record, when I
8 say in the record, if you're going to point me to some
9 supplemental report that sets forth in detail any new
11:24:38 10 opinion beyond the scope of what was set forth in this
11 expert's opinion, in his report of September 7, then you can
12 share with me for the record.

13 I'm going review his report again. I'm going to look
14 in the record to see if there is any supplementation as
11:24:51 15 required by the rule. If there is not, I'm going to be
16 guided by, again, with my earlier ruling and what the civil
17 rules require as to the scope of this witness's opinions.

18 Furthermore, I am contemplating allowing counsel for
19 the defendant to further voir dire this witness outside the
11:25:12 20 presence of the jury or further at least require him to
21 testify outside the presence of the jury so that I can be
22 certain that any opinions that he renders or any testimony
23 he gives are not outside the scope of what he has previously
24 provided by way of his report.

11:25:29 25 His last answer strikes me as clearly inconsistent

1 with his report, and unless I see a supplemental report
2 setting forth that opinion, it will be excluded and I will
3 so instruct the jury. I'm not going say this again. And I
4 put both sides on notice. Defenses will be stricken -- this
11:25:50 5 case is at the point where I am nearly ready to contemplate
6 either excluding this witness's testimony, or dismissing
7 this case.

8 There is no good reason for not complying with the
9 civil rules and providing notice to the other side of expert
11:26:10 10 opinions in this case.

11 I haven't seen any, I haven't heard any good reason.
12 And this jury, I feel so -- I am so sympathetic to their
13 plight. We didn't start until 10:30 this morning, and first
14 thing this morning I deal with motions in limine about
11:26:26 15 testimony, undisclosed testimony. If it's not in the
16 report, and there hasn't been a supplementation, counsel,
17 there will be no opinions rendered regarding the matter.

18 That's all. I'm taking ten minutes and I'm going
19 decide whether we're going to require this witness to
11:26:43 20 testify outside the presence of the jury so I can be sure
21 there is no new matters raised.

22 If you want to confer with one another, as I've been
23 harping about in this whole case, you may do so.

24 Thank you.

11:27:00 25 (Recess taken, 11:25 until 11:40.)

1 THE COURT: What we will do is as follows. Dr.
2 Brink will retake the witness stand. Counsel for the
3 plaintiff, you will review with Dr. Brink in somewhat of a
4 summary fashion each specific opinion that he intends to
11:39:20 5 give in this case. You will also point, for the benefit of
6 the Court and opposing counsel, present the doctor with a
7 copy of his report. He will verify and call to the Court's
8 attention, as well as to opposing counsel's attention, the
9 specific portions of his report upon which his opinion is
11:39:40 10 based, or where he references that opinion.

11 If there is a supplemental report that was prepared
12 and submitted setting forth any new opinions, he may refer
13 to that.

14 Doctor, so it's clear, any opinions that you give in
11:39:56 15 this case must have been opinions that were fully disclosed
16 in your report, that you submitted, as it relates to this
17 matter? Is that understood?

18 THE WITNESS: Which report are you referring to?

19 THE COURT: The report dated September 7, 2007,
11:40:12 20 which you rendered in this case that were provided to
21 opposing counsel. If there was a supplemental report that
22 you have that was prepared and timely submitted to opposing
23 counsel, you may refer to that report, and you may render
24 opinions that you submitted in that supplemental report.

11:40:32 25 Is there a supplemental report?

1 MR. THOMPSON: There is.

2 THE COURT: When was it?

3 MR. ELFVIN: December 8, 2007, Your Honor.

4 THE COURT: It was filed when?

11:40:40 5 MR. ELFVIN: December 8, 2007, or it was
6 tendered to the other side. I don't know if it was filed
7 that date. But it was tendered to the defense December 8.
8 I don't think we have an issue of whether they got both
9 reports.

11:40:52 10 THE COURT: Did you receive the December 7
11 report?

12 MS. AMBROSE-RUBRIGHT: We did, Your Honor.

13 THE COURT: Excuse me. December 8 report.

14 I will take that report as well, a copy of same. Let
11:41:01 15 me just double check here. I have a copy of the December 7
16 report in front of me. I also have a copy of the curriculum
17 vitae, and I'll take the supplemental report, December 8.

18 MR. ELFVIN: Thank you, Your Honor.

19 THE COURT: Provide the witness with his expert
11:41:17 20 reports, and you will now examine the witness for the record
21 outside the hearing of the jury. He will set forth the
22 specific opinions that he intends on giving in this case,
23 and he will refer the Court to the page and paragraph of his
24 report that references that opinion or those opinions. So
11:41:35 25 that I can be certain that the testimony he is giving has

1 been fully disclosed as required by the rule.

2 Doctor, so it's clear, before this jury, there will be
3 no testimony, there will be no opinions rendered outside of
4 those that have already been made part of your written
11:41:55 5 reports in this case. Is that understood?

6 THE WITNESS: To make sure it's clear, that would
7 exclude my declaration?

8 THE COURT: That excludes your declaration unless
9 that declaration was part of a supplemental report as
11:42:07 10 required by the civil rules which I've already set forth for
11 the record what is required. Whether the reports or
12 opinions are given in your deposition testimony, what have
13 you, supplementary reports are required by the rule to avoid
14 any unfair surprise and to make certain that there is no
11:42:27 15 confusion among the parties as to what opinions are going to
16 be rendered in this case.

17 If you have any questions, you are not to answer the
18 question. Is that understood?

19 THE WITNESS: Yes.

11:42:39 20 THE COURT: And I want to make it very clear,
21 I've already said, if there is any opinions, new opinions,
22 undisclosed to the other side, that become part of this
23 case, I am reluctant to do it, don't want to do it, it's a
24 harsh sanction, but given the time we have spent addressing
11:42:56 25 these issues, given the undue burden to the jury in this

1 case, this case is subject to either dismissal, I won't
2 allow this witness to testify or other sanctions will be
3 imposed.

4 Is that clear? Anyone have any questions about what
5 I've just now set forth on the record in this case?

6 MS. AMBROSE-RUBRIGHT: No, Your Honor.

7 MR. THOMPSON: No, Your Honor.

8 Your Honor, we would reiterate the issue here is
9 unfair surprise, as per the Sixth Circuit case law that's
10 controlling on this issue, the issue is not as a constrained
11 report, other side surprised by this. There is extensive
12 testimony in his deposition, for example, about some of
13 these issues. The only issue we are talking about here is,
14 if you listen to his testimony, it's not going to change
15 this. This is just one of the little blocks as far as
16 four-fifths rule.

17 It does not change his opinion, this has no impact on
18 his opinion. The opinion was the same regardless.

19 THE COURT: So as I understand it, he gave no
20 opinion regarding the specific issue that you're now
21 attempting to raise. He gave no opinion in his report. He
22 indicated he had no opinion.

23 As to unfair surprise, the problem, sir, with unfair
24 surprise, is that you may think it's not unfair surprise,
25 but in the middle of the trial, counsel has experts

1 traveling from out of state. If new opinions are now being
2 raised, in my view based upon the history of this case, the
3 extensive issues in discovery, the extensive disputes
4 between the parties, any new opinions are unfair, not any,
5 but in these specific instances they are unfair, the rule
6 requires, Rule 30, I have to keep reading it, because no one
7 seems to want to follow it or seems to feel it doesn't apply
8 or seem to believe they can ignore it, says clearly, "For an
9 expert whose report must be disclosed under Rule 26, the
10 parties' duty to supplement extends both to information
11 included in the report and to information given during the
12 expert's deposition. Any additions or changes to this
13 information must be disclosed by the time of the party's
14 pretrial disclosures as required under Rule 26(a)(3).

15 30 days before trial.

16 Not the day of, not the -- during trial. 30 days
17 before trial.

18 MR. THOMPSON: If we could approach, Your Honor,
19 I'll show you exactly where we are coming from why this is
20 not really --

21 THE COURT: Is there a supplemental report?

22 MR. THOMPSON: It's off of Dr. Jeanneret's
23 report. This is the data Dr. Jeanneret provided.

24 THE COURT: So what? Did he then look at Dr.
25 Jeanneret's report and then say by the way, I now have a new

1 opinion. I've looked at something in the record. I'm going
2 to testify as to a new matter, a new opinion? My opinion
3 has changed. I want to supplement.

4 MR. THOMPSON: No, there is nothing like that.

11:45:45 5 THE COURT: Thank you.

6 MR. THOMPSON: We're using data --

7 MS. AMBROSE-RUBRIGHT: Your Honor, I would like
8 to put something on the record before we start.

9 THE COURT: Quickly.

11:45:56 10 MS. AMBROSE-RUBRIGHT: I took Dr. Brink's
11 deposition on July 2. He said that he was offering an
12 opinion --

13 THE COURT: You need to say what year given the
14 history of this case.

11:46:06 15 MS. AMBROSE-RUBRIGHT: July 2, 2008. He does not
16 have any opinion that there is age discrimination on the
17 captain's exam. In his declaration, captain's age, there is
18 no four-fifths rule violation for age, no further analyses
19 were performed, no further statistical analyses are
11:46:25 20 discussed regarding adverse impact for age. That is as of
21 October 3.

22 THE COURT: If you're going to make a record,
23 refer to the page and paragraph of the deposition and line
24 and then also refer to the declaration so you make that a
11:46:38 25 part of the record.

1 MS. AMBROSE-RUBRIGHT: The deposition of Dr.
2 Brink is on page 80, lines 6 through 13. In his
3 declaration, which is document 100 in this case, which was
4 filed on October 3 of 2008, in paragraph 70, Dr. Brink
11:46:57 5 indicates that he is not giving an opinion on age on the
6 captain's exam. There has been no subsequent report or
7 opinion rendered.

8 THE COURT: Anything else you wish to add?

9 MS. AMBROSE-RUBRIGHT: Not at this time, Your
11:47:13 10 Honor.

11 MR. THOMPSON: Yes, sir, if you look at the
12 context of that very testimony, again, none of this changes
13 his opinion. His opinion is remaining the same. His
14 opinion is not changing. All this is, is a computation.
11:47:25 15 And when you look at the deposition testimony, he is saying
16 I'm not certain what data I used. It looks to be the same.
17 I don't have an opinion. I believe that is the case. I
18 would have to go back and look at our analysis to verify
19 that. He was basically saying I didn't have all the data,
11:47:40 20 expressing an opinion not based on it.

21 When he would take Dr. Jeanneret's data that he
22 produces in his report -- they produced it to us, it's their
23 data -- all we're doing is taking their data. I can put it
24 up in front of him and say using this data is there a
11:47:55 25 four-fifths rule violation. But this does not change his

1 opinion.

2 THE COURT: He didn't have an opinion. He said
3 he did not have an opinion. I just listened to the
4 deposition testimony. He said he didn't have an opinion.
5 The fact of the matter that you then later gave him new data
6 and he formed an opinion, all that does is confirm your
7 obligation to share it with the other side.

8 I'm not going to debate it further while the jury is
9 waiting. This witness will be examined. He will set forth
10 the opinions that he intends on giving before this jury,
11 quite frankly, in detail. Because again, I'm not going to
12 deal with, well, he now has a new opinion that he didn't
13 disclose. But that's okay because we now just looked at
14 some new data that we think he now should be able to give a
15 new opinion on even though he didn't disclose it. So that's
16 not permitted.

17 MR. THOMPSON: Okay.

18 THE COURT: I'm going to hear from him regarding
19 every opinion that he intends on giving, and he can point to
20 his reports, establishing the basis for those opinions.

21 MR. THOMPSON: Okay.

22 THE COURT: And, once that is done, then we're
23 going to take a break, counsel is going to be allowed to
24 gather themselves, and then he'll be called back to the
25 witness stand to testify.

1 And you'll testify consistent with that that he has
2 earlier disclosed in the case. Nothing beyond that.

3 MR. THOMPSON: Okay.

4 THE COURT: Is that clear?

11:49:12 5 MR. THOMPSON: That's fine.

6 THE COURT: And if I have any more problems of
7 this nature or issues in this case, counsel you're
8 admonished from my earlier comments to you, I made it very
9 clear about opinions and nondisclosure, there will either be
11:49:25 10 a sanction -- and I'm not sure what it will be. But there
11 will be a sanction, up to and including dismissal of this
12 case.

13 This is wholly inappropriate in the middle of this
14 lengthy trial for these juries to be kept waiting and
11:49:37 15 waiting and waiting while we sort out issues of this nature.

16 Begin your examination.

17 VOIR DIRE EXAMINATION OF KYLE E. BRINK

18 BY MR. THOMPSON:

19 Q. Dr. Brink, when you issued your report, did you find
11:49:53 20 that there was a four-fifths rule violation at the rank of
21 age -- or rank of captain for age?

22 A. I did not find a four-fifths rule violation.

23 Q. What data did you use to base that conclusion?

24 A. I'm not sure where the age data came from. I believe
11:50:11 25 it came from Dr. Johnson.

1 Q. Okay. Are you going to be expressing an opinion or
2 are you going to be discussing Type I, Type II error?

3 THE COURT: Will you be expressing opinions. Not
4 discussing, sir. He's here to express expert opinions, not
11:50:28 5 discussing matters.

6 MR. THOMPSON: Fair enough.

7 Q. Are you going to be expressing opinions on Type I,
8 Type II error?

9 A. Yes.

11:50:39 10 Q. And that is in your report where, sir?

11 A. Page 6. Page 5 as well.

12 Q. Are you going to be expressing opinions on the
13 appropriateness of using statistics as a method of
14 determining adverse impact in this case?

11:51:21 15 A. Yes.

16 Q. And in your report, or your supplemental report, where
17 are those?

18 A. Pages 4, 5.

19 THE COURT: And what are the opinions going to
11:51:43 20 be? You can tell us specifically what opinions you're going
21 raise, where you have referenced them in the report.

22 A. Start with the types of test that I used, and the
23 results of those tests. That's it.

24 Q. Okay. If we go to page 18 of your report, are you
11:52:52 25 going to be expressing an opinion that validity evidence is

1 required?

2 A. Yes.

3 Q. Are you going to be expressing opinions that job
4 analyses for both lieutenant and captain were inadequate?

11:53:08 5 A. Yes.

6 Q. Are you going to be expressing opinions that an
7 inadequate number of subject matter experts was used to
8 conduct the job analysis?

9 A. Yes.

11:53:21 10 Q. Are you going to express an opinion that regardless of
11 the type or quality of the examination that was used, the
12 examinations cannot be demonstrated to be job related or
13 valid since without an adequate job analysis, no one -- one
14 cannot fully know what the job entails?

11:53:39 15 A. Yes.

16 Q. Are you going to be expressing the opinion, sir, that
17 E.B. Jacobs failed to gather appropriate ratings from SME's
18 on work behaviors, for example, whether work behaviors must
19 be performed upon entry into the position. This is also

11:53:55 20 known as day one? Sir is that --

21 A. Yes.

22 Q. Day one, I'm sorry, go ahead. And KSA's, that's
23 knowledge, skills and abilities?

24 A. Yes.

11:54:06 25 Q. Whether proficiency in the given KSA's are needed upon

1 entry into the position, how the knowledge assessed is used
2 on the job, and whether the measured KSA's can differentiate
3 among levels of job performance that are necessary to
4 determine the appropriateness of the tests. Are you going
11:54:23 5 to be expressing opinions like that, sir?

6 A. Yes.

7 Q. Are you going to be expressing an opinion that the
8 examinations did not assess a representative sample of job
9 domain?

11:54:32 10 A. Yes.

11 Q. Are you going to be expressing the opinion, sir, that
12 either alternative types of assessments nor alternative
13 scoring/waiting methods were considered as required by the
14 uniform guidelines?

11:54:44 15 A. Yes.

16 Q. Are you going to be expressing the opinion that the
17 assessment process was flawed due to vague behavioral
18 anchors and no panel rotation?

19 A. Yes.

11:54:54 20 Q. And are you going to be expressing the opinions, sir,
21 that there was no basis from the validation study for
22 ranking of candidates?

23 A. Yes.

24 Q. Your testimony is going to be addressing those
11:55:09 25 opinions and the reasons for those opinions drawn from your

1 report as testified here today?

2 A. Yes.

3 Q. As to the supplemental report, sir, are you going to
4 be expressing the conclusions identified in the supplemental
11:55:28 5 report relating to alternative measures?

6 A. Yes.

7 Q. And those opinions are going to be as to the weighting
8 scheme that was used by E.B. Jacobs, Doctor?

9 A. Yes.

11:55:48 10 Q. Any others relating to alternative measures, sir?

11 A. A separate weighting scheme, a supplemental expert
12 weighting scheme. Excuse me, I'm sorry, the dimension
13 weighting scheme.

14 Q. Okay.

11:56:09 15 A. Subject matter expert weighting, and perhaps
16 alternative testing methods.

17 MR. THOMPSON: I think that's the extent of what
18 we're going him, Your Honor.

19 THE COURT: Counsel, do you wish to ask any
11:56:27 20 questions of this witness before we adjourn for the lunch
21 hour?

22 MS. AMBROSE-RUBRIGHT: Your Honor, just a few.

23 THE COURT: You may.

24 VOIR DIRE EXAMINATION OF KYLE E. BRINK

11:56:34 25 BY MR. AMBROSE-RUBRIGHT:

1 Q. Dr. Brink, did you supplement either one of the
2 reports that you've just identified?

3 A. Since these reports, I've had my deposition and I
4 submitted a declaration.

11:56:50 5 Q. You have submitted no other reports to the City of
6 Akron regarding this testing process; is that correct?

7 A. That's correct.

8 Q. Dr. Brink, you've never conducted a written job
9 knowledge examination in your entire career, am I correct,
11:57:05 10 developed and administered?

11 A. Not job knowledge test.

12 Q. Thank you. And you're rendering no opinions regarding
13 the job -- written job knowledge test in this case?

14 A. Yes, I am, rendering opinions regarding job knowledge
11:57:24 15 test.

16 Q. And can you tell me where in your report those
17 opinions are with regard to a written job knowledge test?

18 A. Page 14.

19 THE COURT: Of your original or your supplemental
11:57:50 20 report?

21 THE WITNESS: The original.

22 A. I address knowledge and job knowledge analysis prior
23 to that. But if you're referring specifically to job
24 knowledge test, page 14, 15. I believe that's it.

11:58:19 25 Q. Have you ever developed behavioral anchors for any

1 assessment center?

2 A. Yes.

3 MS. AMBROSE-RUBRIGHT: I have no other questions
4 at this time.

11:58:28 5 THE COURT: We will adjourn until --

6 All right, ladies and gentlemen. We will adjourn
7 until 1:00. I have a criminal matter at the lunch hour. We
8 will reconvene at 1:00.

9 Doctor, you'll be in the witness stand at 1:00. And I
11:59:15 10 will expect, again, consistent with my order, any opinions
11 that are rendered by this witness, will have been fully
12 disclosed in both of his reports, and I told you, Doctor,
13 directly, and I will tell you again. Any opinions outside
14 of that set forth in your two written reports submitted in
11:59:35 15 this matter will not be presented to the jury.

16 And just so it's clear, have you submitted, rendered,
17 offered to counsel for the plaintiff any new opinions in
18 this matter outside those that you have set forth in your
19 previous written reports in this case?

11:59:54 20 THE WITNESS: Have I rendered opinions outside of
21 those reports?

22 THE COURT: Yes, any new opinions not previously
23 expressed in those two reports that I have before me?

24 THE WITNESS: Not in reports, no.

12:00:05 25 THE COURT: No, I'm saying opinions. Have you

1 provided counsel for the plaintiff any new opinions
2 regarding the issues in this case, other than those set
3 forth in your report. Or reports? Do you understand my
4 question?

12:00:21 5 THE WITNESS: I'm not sure I understand because
6 my declaration obviously has an opinion, but if that's not
7 an opinion, then no.

8 THE COURT: Well, you set forth in the
9 declaration you're rendering opinions. Outside of that,
12:00:34 10 have you expressed any new opinions?

11 THE WITNESS: The only opinions I expressed are
12 in these two reports, my deposition and my declaration.

13 THE COURT: No new opinions beyond the scope of
14 those?

12:00:44 15 THE WITNESS: That's correct.

16 THE COURT: That's all. We will see you at 1:00.

17 MR. THOMPSON: And Your Honor, just for the
18 record, we'd put on there our objection that we do not have
19 to supplemental a rebuttal, number one, and number two, as
12:00:54 20 it relates to data that flows from, under Rule 26, from
21 their expert reports or data interpreting.

22 We are just putting our objection on the record.

23 THE COURT: I'll note your objection. If I
24 followed that rule, there would never be any finality to
12:01:08 25 this, never be any reasonable order to the proceedings in

1 cases of this nature, number one.

2 If you have a rule that you would cite me to that
3 indicates that there is no requirement for you to submit any
4 rebuttal testimony based upon new information you discover,
12:01:24 5 I would like you to put that on the record as well.

6 MS. AMBROSE-RUBRIGHT: Your Honor, I also have
7 one question with regard to what we're going do -- what with
8 what the jury has already heard. I have grave concerns that
9 it has unfairly prejudiced us, and --

12:01:39 10 THE COURT: When you say -- which question are
11 you referring to the last question regarding the age
12 question?

13 MS. AMBROSE-RUBRIGHT: Yes.

14 THE COURT: Which I have, just a moment here. I
12:01:48 15 have highlighted, I believe, on my real time. And the
16 question was, was there adverse impact against candidates
17 over the age of 40. There was an objection. I overruled
18 it, and then you call a side-bar and called my attention to
19 this issue that I've now tried to address. What is your
12:02:10 20 suggestion, counsel, since you raised that issue?

21 MS. AMBROSE-RUBRIGHT: Your Honor, I had thought
22 that the witness answered the question that he gave an
23 opinion that there was adverse impact based on age on the
24 captain's examination? I'm sorry. It does not sound like
12:02:27 25 that. I was relying on memory. I think that my emotions

1 probably took over my brain at that point, Your Honor.

2 THE COURT: Do you wish to be heard, quickly,
3 counsel?

4 MR. ELFVIN: Very briefly, Your Honor. I believe
12:02:38 5 that he testified that he found a violation of the
6 four-fifths rule, at least that's my recollection of his
7 answer.

8 THE COURT: Here's what I have. I'll read it
9 back so we can --

12:02:48 10 MR. ELFVIN: Thank you.

11 THE COURT: I'll read it back even further. I'm
12 reading from my real time.

13 "Q. Was there an adverse impact against black
14 candidates for lieutenant --

12:03:05 15 "Q. Again, using the same foundation, based on your
16 review of the data that the City of Akron presented to this
17 Court, did you compute the impact ratio relating to race at
18 the captain rank?

19 "A. Yes.

12:03:16 20 "Q. Were you able to compute that adverse impact?

21 "A. Yes.

22 "Q. Tell the jury what you found?

23 "A. There was adverse impact against white
24 candidates.

12:03:27 25 "Q. And this is using four-fifths rule?

1 "A. That is correct.

2 "Q. Same set of questions relating to age at the
3 rank of lieutenant using the City of Akron's data they
4 presented to this Court, were you able to compute the impact
12:03:43 5 ratio as to age at the rank of lieutenant?

6 "A. Well, when I looked at the City of Akron's
7 report, I actually think there was an additional error -- or
8 an addition error in one of the tables. But once I
9 corrected that, yes, there was adverse impact.

12:03:58 10 "Q. Again, using four-fifths rule?

11 "A. That's correct.

12 "Q. And when you say adverse impact, describe what
13 you mean adverse impact, as to what group, or to which
14 group?

12:04:15 15 "A. There is adverse impact against candidates over
16 the age of 40.

17 "Q. And at the rank of captain, were you able to
18 compute, using the data that the City of Akron gave to this
19 Court, were you able to compute the impact ratio as to
12:04:29 20 persons over the age of 40 at the rank of captain?"

21 The answer was yes.

22 And the question was,

23 "Q. And that was, sir, that was adverse impact
24 against candidates over the age of 40?"

12:04:41 25 And there is an objection, and we called the side-bar.

1 So he did testify outside, as I understand it, the scope of
2 his earlier opinion that this was adverse impact at the rank
3 of 40, persons over the age of 40.

4 MR. ELFVIN: Your Honor, and the reason I wanted
12:04:58 5 that read back was because I wanted to make sure exactly
6 where his testimony ended. Because I do believe if he's
7 asked the follow-up question, and did you examine that data
8 and reach a conclusion that changes what's in your report,
9 his answer is going to be no.

10 MR. THOMPSON: His opinion doesn't change.

11 MR. ELFVIN: That's my understanding of Dr.
12 Brink's testimony on this subject.

13 THE COURT: But what he said in his report was,
14 as I recall -- and we can read it into the record, that he
12:05:27 15 had no opinion.

16 MR. ELFVIN: And that's what I'm saying. He will
17 say I have no opinion based on reviewing the additional
18 data, but I did calculate a four-fifths violation, but when
19 I looked at it, it did not -- I have no opinion as to
12:05:41 20 discrimination or adverse impact, you know, based on over
21 40. I'm trying to avoid giving the jury instructions that
22 may not be necessary. That's all.

23 THE COURT: Counsel, the defendant wishes to be
24 heard as well?

12:06:01 25 MS. AMBROSE-RUBRIGHT: Your Honor, I think it's

1 just a back-door way to try to leave the inference that
2 there is age discrimination on the captain's test. I would
3 ask the Court to instruct the jury that Dr. Brink has
4 offered no opinion regarding age discrimination on the
12:06:19 5 captain's examination, and did not find any violation. That
6 is what his report says.

7 THE COURT: Do you have the report? Let me
8 just -- refer me to the page. I have the report here. Just
9 refer me to the page again so I have it. Do you have a
12:06:38 10 highlighted copy? And you've also referred me to his
11 deposition testimony.

12 MS. AMBROSE-RUBRIGHT: On page, 5, Your Honor,
13 under table 4, the very last sentence, it says:
14 "Statistical tests were not run for age because adverse
12:07:05 15 impact was not observed based on four-fifths rule."

16 THE COURT: We're at page 5 of his -- of the
17 report?

18 MS. AMBROSE-RUBRIGHT: Of his September 7, 2007
19 report. There are two tables. Under table 4, identified as
12:07:20 20 outcomes of statistical tests for adverse impact for fire
21 captain, the very last sentence in the note under the table.

22 THE COURT: So he says here that there was no
23 adverse impact even based on four-fifths rule, as I
24 understand it?

12:07:54 25 MS. AMBROSE-RUBRIGHT: That's correct.

1 THE COURT: Let me just read back the testimony.
2 Is that inconsistent with his testimony.

3 MR. ELFVIN: Your Honor, it's inconsistent with
4 his testimony because he said he looked at different
12:08:10 5 numbers, and it's -- Your Honor, simply, it is inconsistent
6 with his testimony as -- before we broke.

7 THE COURT: All right. I'm going to instruct the
8 jury to disregard the witness's testimony as it relates to
9 the captain's examination. Any testimony regarding same,
12:08:27 10 I'm going to strike.

11 MR. ELFVIN: Are we talking about age, Your
12 Honor.

13 THE COURT: Just on age, consistent with what he
14 has set forth in his report, I'm going to instruct them to
12:08:35 15 disregard his testimony regarding any age related impact as
16 it relates to, I'll phrase it perhaps more artfully, as it
17 relates to the captain's exam.

18 MR. THOMPSON: I think you said race. It's just
19 age.

12:08:49 20 THE COURT: I'm sorry.

21 MR. THOMPSON: I thought I heard you say race.

22 THE COURT: I said age, age only.

23 MR. THOMPSON: Thank you.

24 THE COURT: You may step down, sir.

12:08:57 25 (Recess taken, 12:10.)

1 WEDNESDAY AFTERNOON, DECEMBER 10, 2008

2 (Jury in, 1:10.)

3 THE COURT: Thank you, ladies and gentlemen for
4 your patience. Let me just give you a brief instruction, if
13:11:36 5 we may. Ladies and gentlemen, please disregard the portions
6 of this witness's testimony related to adverse am packet for
7 fire captain. When I say fire captain, any age-related
8 testimony from this witness regarding fire captain, you
9 should please disregard that testimony.

13:11:52 10 Of course, you're free to consider any other testimony
11 the Court has not sustained an objection to, etcetera. You
12 can consider the rest of the testimony, but none related to
13 adverse am packet, age related testimony related to the
14 captain's examination only.

13:12:07 15 Thank you very much, ladies and gentlemen.

16 Counsel, you may resume your inquiry.

17 MR. THOMPSON: Thank you. Sorry, ladies and
18 gentlemen. I would like to proceed with the direct
19 examination, Your Honor.

13:12:18 20 THE COURT: Yes, you may.

21 Q. Dr. Brink, do you have an opinion regarding those
22 instances where adverse impact exists, regarding whether
23 validity evidence is required?

24 A. Yes, when adverse impact exists, validity evidence is
13:12:35 25 required.

1 Q. And upon what do you base at that opinion, doctor?

2 A. The uniform guidelines.

3 Q. And specifically tell the jury what the uniform
4 guidelines require?

13:12:44 5 A. The guidelines require when there is adverse impact,
6 that there is sufficient evidence to demonstrate the
7 validity of the selection procedure that was used.

8 Q. And the validity strategy that was used with regards
9 to these Akron lieutenant and captain promotional exams, was
10 contend validity?

11 A. That's correct.

12 Q. And is content validity the only strategy that's
13 possible to use?

14 A. No, there are multiple strategies for validating
13:13:12 15 select procedures.

16 Q. With regard to content validity, describe for the jury
17 basically what that is?

18 A. Content validity is when you try to make sure that the
19 selection procedure is an adequate for representative sample
13:13:26 20 of what's perform on the job.

21 And one thing about consent validity is -- well,
22 another consideration is --

23 MS. AMBROSE-RUBRIGHT: Objection.

24 THE COURT: Sustained. I'm sorry, sir. Please
13:13:34 25 just answer the question. Counsel will follow up with

1 additional questions.

2 Q. There will be follow up-questions, Doctor.

3 THE COURT: Thank you. One issue at a time. Go
4 ahead, sir.

13:13:42 5 Q. With regard to consent validity, you testified that it
6 has to be representative of the -- what was it
7 representative of?

8 A. We call it the job domain.

9 Q. So that's a term the jury hasn't heard yet. When
13:13:56 10 you're talking about job domain, sir, explain to the jury
11 what you're talking about?

12 A. The job domain is determined through a job analysis.
13 When you're doing a job analysis, you identify work
14 behaviors or duties, tasks, these are the activities that
15 are performed by incumbents, and you must typically identify
13:14:10 16 the knowledge, skills, and abilities that are required to
17 perform those duties or tasks.

18 Q. And the knowledge, skills, and abilities are generally
19 abbreviated to KSA's?

13:14:25 20 A. That's correct, that's an acronym.

21 Q. Those becomes an alphabet soup-type thing. So
22 whenever we're talking about KSA's we are talking about
23 knowledge, skills, ability?

24 A. That's correct.

13:14:36 25 Q. What are some of the underlying assumptions as far as

1 content validity. What must -- in other words, in order for
2 content validity to be appropriate strategy, what must the
3 examination or selection method be in relation to the job to
4 make that argument?

13:14:55 5 A. In order to be content valid, the two most important
6 things are that's it's a representative sample of the
7 particular job in question. The second really important
8 feature of content validation would be that the test itself
9 closely resembles the job. The closer the test appears to
13:15:15 10 the actual job behave jurors, the more valid. Earlier this
11 morning --

12 Q. Wait a minute.

13 A. Okay.

14 Q. So, for example, when you talk with assessment center
13:15:24 15 exercises, those are what you characterized, I believe as
16 simulations?

17 A. Yes, that's correct.

18 Q. So the closer those simulations actually resemble the
19 actual experience you have on the job, the stronger the
13:15:36 20 argument can be made for content validity?

21 A. That's correct.

22 Q. And it works the other way, I guess, the farther
23 removed away the selection device is from the actual job,
24 the weaker argument is made for content validity?

13:15:49 25 A. That's correct.

1 Q. So, for example, in this case there are paper and
2 pencil tests?

3 A. Correct.

4 Q. How close to those types of tests resemble the actual
13:15:58 5 experience on the job?

6 MS. AMBROSE-RUBRIGHT: Objection.

7 THE COURT: It's overruled.

8 A. Most jobs do not require people to answer multiple
9 choice questions. Therefore, on the continuum, that would
13:16:09 10 not be similar to the job. The term we use is fidelity.
11 Fidelity -- high fidelity is the close match between the job
12 and the test much so that would be a low fidelity test.

13 Q. Being that it doesn't resemble the job?

14 A. That's correct.

13:16:26 15 Q. And the other attribute was that it has to be a
16 representative sample of the job domain?

17 A. That's correct.

18 Q. And to be a representative sample of the job domain,
19 what must an exam be? What must it do?

13:16:40 20 A. Well, it should be -- your goal is to measure as many
21 KSA's as feasible. And as you're determining that, you
22 should try and measure the more important ones prior to the
23 least important ones. You can't measure everything but your
24 goal is to try and -- given the entire domain, you want to
13:17:00 25 try and have a representative sample. You don't want to

1 measure one narrow part of that domain. You want to try and
2 be as comprehensive as you can.

3 Q. The validation evidence that existed in this case, was
4 it sufficient to support an argument for content validity?

13:17:16 5 A. I do not think so.

6 Q. And, sir, what do you base that opinion on?

7 A. The job analysis.

8 Q. That's the next phase. Do you have an opinion on the
9 job analysis on whether they were inadequate at both ranks,
10 captain and lieutenant?

11 A. I believe the job analysis was inadequate at both
12 ranks, captain and lieutenant.

13 Q. Let's start with the job analysis what do you base
14 that opinion on, Doctor.

13:17:49 15 Let me be a little more precise. How was the job
16 analysis down in this case based on the documents that you
17 reviewed from E.B. Jacobs? How was it done?

18 A. To try and summarize the job analysis, it began by
19 convening -- just from, to start off, the job analysis
13:18:12 20 procedure was the same for the captain, so when I'm
21 describing this, it would be applicable to both lieutenant
22 and captain.

23 Q. So the same process was used for both?

24 A. That's correct.

13:18:20 25 Q. Okay. What did Akron do; what did E.B. Jacobs do as

1 far as how he conducted job analysis everyone the job
2 analysis?

3 A. E.B.J. has a list of existing duties and tasks from
4 their file drawer or off their shelf, whatever you want to
13:18:38 5 call it, from their previous work. The job analysis began
6 with that list of tasks from other agencies.

7 Q. So this was a task analysis?

8 A. This would be -- yeah, an analysis of the tasks that
9 are used in the job.

13:18:52 10 Q. And let's talk, Dr. Brink, if we could, please, one of
11 the things that an exam is supposed to measure, tasks versus
12 duties, versus abilities versus knowledge. Define tasks,
13 duties, abilities, and knowledge for this jury, please.

14 A. Okay. Duties and tasks are similar. They're
13:19:17 15 activities that are performed on the job. Typically duties
16 are also call work behaviors. These are broader activities.
17 Tasks fall within those work behaviors. So we have a
18 general category called work behavior or duty. Being in a
19 might be five, ten, 15 tasks that help clarify or narrow
13:19:35 20 down what's actually performed within that work behavior .

21 Knowledge is typically refers to a body of information
22 that you might use or reference on the job. And this could
23 be procedure manuals, operations manuals, a number of other
24 knowledge sources.

13:19:51 25 And abilities are -- easiest to describe abilities is

1 with examples, mathematical exhibit, memory, interpersonal
2 skills, these are the scope of the abilities we possess.

3 Q. Just for the benefit of the court reporter, you have
4 to slow it down just a little bit?

13:20:13 5 Dr. Brink, when we're talking about Akron's job
6 analysis, the job analysis that was done in Akron, was this
7 off the shelf or task list that Dr. Jacobs or Jacobs had,
8 did you have a chance to see that during your review of
9 document?

13:20:32 10 A. Yes, I did.

11 Q. Did Dr. Jacobs in his final report or anywhere explain
12 where these tasks came from?

13 A. Not specifically. I believe it was indicated in the
14 report that the tasks were from prior -- from work done in
13:20:54 15 prior agencies.

16 Q. Prior agencies, prior cities?

17 A. Yes, I would presume cities outside the City of Akron.

18 Q. So what did Jacobs & Associates do with that task
19 analysis? What did they do with it?

13:21:08 20 A. They convened a group of six people and they asked
21 those six people to review those task and duties.

22 Q. We were starting to talk about job analysis but only I
23 don't think so went into specifics. Specifically what is a
24 job analysis?

13:21:29 25 A. A job analysis is a study of a job, really to identify

1 what's performed on the job. And this is the duties and
2 tasks I talked about earlier, as well as what's required to
3 perform the job. And this would be the knowledge, skills
4 and abilities or KSA's. So it's a study of what's performed
13:21:49 5 and what it takes to perform that.

6 Q. And why do you do it?

7 A. Job analysis is a foundation for validity. Without a
8 job analysis, there is simply no way to know if your test is
9 valid. You have to know what's required for the job before
13:22:04 10 you can measure -- before you can develop a test to measure

11 whether or not somebody would perform well in the job. We
12 call it the foundation for our validation studies.

13 Q. And how do you do it in Jefferson County?

14 A. The job analysis process we follow at the personnel
13:22:26 15 board at Jefferson County begins with a review of whatever
16 information we might have on hand. That may be previous job
17 analyses that we perform at Jefferson County. It may be
18 class specifications which are shorter descriptions of jobs.
19 It might be research related to the applicable job. That's
13:22:43 20 the first step.

21 Q. What's the next?

22 A. The second step we usually follow is to conduct what
23 we call site visits or site observations. And this is where
24 a person will go out and actually observe an incumbent
13:22:56 25 performing their job. We're trying to see what they

1 actually do on the job, observe what they perform on the
2 job. We can ask them what work is on the job, ask them for
3 examination of documents of materials that people used on
4 the job, to try and get an in-depth understanding of what
13:23:10 5 they actually do.

6 Q. Then what?

7 A. Our next step is we convene what we call focus groups
8 with the incumbents, and we have incumbents are people who
9 are currently working in the job that we're studying.

13:23:24 10 Q. What do you do with this focus group?

11 A. Actually, between the site visits and focus groups, we
12 developed a preliminary list of work behaviors or duties,
13 tasks, as well as knowledge, skills and abilities.

14 Q. You do that?

13:23:38 15 A. That's correct.

16 Q. Go on. I didn't mean to interrupt you.

17 A. So in this focus group, we bring together six, eight,
18 ten subject matter experts, we refer to them as. These are
19 incumbents who are employees in the job. And we ask them to
13:23:53 20 review those lists. We ask them to see if anything is
21 missing. If so, we would add that in. Or if it is
22 something that's inappropriate, we would want to remove
23 that. Or we ask them to revise information that might be
24 there as applicable.

13:24:08 25 Q. What do you do with that information?

1 A. Based on that information, we will revise that list.
2 And then we will convene a second group of supervisors to
3 confirm or also review what the incumbents or employees
4 revised. Then we will have them go through the same process
13:24:27 5 of examining work behaviors, the tasks, as well as the
6 knowledge, skills and abilities that are required, and then
7 add if anything is missing, delete things that are not
8 important or revise things that may not be applicable.

9 Q. So by the time you get to the supervisors, you have
13:24:44 10 already done more than one visit?

11 A. That's correct.

12 Q. You already done focus groups with incumbent in the
13 position?

14 A. That's correct.

13:24:51 15 Q. And after you do the supervise, do you do anything
16 after that?

17 A. We would revise the list again, if there were changes,
18 and then we put work behaviors, tasks, knowledge skills and
19 ability in a questionnaire and then we administer that
13:25:04 20 questionnaire to the subject matter experts.

21 Q. What do you do with the results from that?

22 A. We will analyze those results and look at what some of
23 the more important work behaviors tasks and KSA's are.

24 Q. At any time do you ever go to the general population
13:25:20 25 of incumbents in the position beyond the focus group to get

1 their input?

2 A. The job analysis questionnaire would be getting their
3 input. It's a questionnaire where we ask them to rate the
4 importance of, for example, duties, tasks, and KSA's. So we
13:25:38 5 are getting input from the incumbents the subject matter
6 expert's subsequent to the focus groups.

7 Q. Okay. The questionnaire is distributed on the average
8 to what percent average of all the incumbents?

9 A. I think for the most part we target around 75 percent
13:26:05 10 to the incumbents. Some jobs have fewer incumbent. If
11 there were only ten incumbents we to try and target all ten.
12 If there are a hundred or a very large number, we would
13 probably target around 75 percent.

14 Q. How many subject matter experts were there in the City
13:26:31 15 of Akron for each rank at the job analysis phase of this
16 examination?

17 A. There were six subject matters used and captain and
18 lieutenant.

19 Q. Do you know how they were selected?

13:26:46 20 A. I do not.

21 Q. Was it disclosed anywhere how they were selected in
22 either the final report or any of the documentation that was
23 given to you as part of this case?

24 MS. AMBROSE-RUBRIGHT: Objection.

13:26:59 25 A. I don't believe so, but I would have to check the

1 report.

2 THE COURT: Excuse me. Just a second. There is
3 an objection.

4 THE WITNESS: Sorry.

13:27:09 5 THE COURT: It's overruled. You can answer the
6 question, if you know.

7 Q. The question was, was it disclosed to you how the
8 subject matter experts were selected?

9 A. It may be in the report, I don't think. I do not
13:27:23 10 think it was disclosed.

11 THE COURT: Do you know or do you not recall?
12 What's the answer?

13 THE WITNESS: I'm sorry. I do not know.

14 THE COURT: Thank you.

13:27:31 15 Q. What are the subject matter expert's responsibilities
16 with respect to defining the job domain?

17 A. Subject matter expert -- I mean the responsibility
18 would be to give a thorough review of the lists, and provide
19 their evaluation of whether or not they actually perform the
13:28:07 20 duties that are described and provide input into whether or
21 not the lists are appropriate.

22 Q. What are day one ratings?

23 A. Day one ratings are ratings that identify whether or
24 not a particular knowledge, skill, ability or duty is
13:28:25 25 required when a person enters the job. And this is

1 something that's required by the uniform guidelines and SIOP
2 principles. It's inappropriate to measure something what's
3 not needed before a person would enter the job.

4 Q. Explain that. What does that mean?

13:28:41 5 A. For example, if a person learns about a knowledge
6 while they're on the job, or if they develop skills through
7 coaching or whatever it might be, once they're hired or
8 promoted to that job, it's not something that you would want
9 to measure in the selection procedure because technically
13:28:59 10 it's not actually required before they enter the job.

11 Q. Does that same rational apply to duties and
12 responsibilities that an incumbent or someone assigned to a
13 job is never required to know?

14 A. Please repeat the question.

13:29:16 15 Q. Sure. Does that also apply to those duties, tasks,
16 that a person promoted to the position is never required to
17 know?

18 A. Yeah, if a person would never be required to know
19 that, then it would not be needed at entry.

13:29:35 20 Q. And the data that was provided by E.B. Jacobs to you,
21 and the documentation provided relating to the City of Akron
22 lieutenant and captain examinations in question, was there
23 ever any identification of day one responsibilities or day
24 one duties anywhere in that data?

13:30:01 25 A. There were day one ratings for the knowledge sources.

1 Q. For anything else?

2 A. There were not day one ratings for abilities or duties
3 or tasks.

4 Q. Is will a difference between independent rating and
13:30:22 5 consensus rating with regards to a job analysis?

6 A. Yes.

7 Q. Explain to the jury, first, what independent rating is
8 and the second one, what consensus rating it?

9 A. An independent rating would be what you have if you
13:30:36 10 give a survey to people. If I ask you all to take a survey,
11 and you take that survey home and fill it out and give it
12 back to me, that would be an independent rating.

13 A consensus rating would be perhaps I gave you all the
14 same survey, but we sat in the same room, and we talked
15 about our responses to that survey, that would be consensus.
13:30:55 16 So as a group, you as a whole reach consensus rating.
17 That's the difference between the two.

18 Q. And what significance does that have in working
19 through a job analysis?

13:31:09 20 A. Independent ratings are prone to measurement error.
21 We'll --

22 Q. We'll talk about that. What is measurement error?
23 Explain that. What is measurement error?

24 A. Well, let's me use the context of a job analysis.
13:31:32 25 Suppose you all have the same -- perform the same job in

1 general but you might each have -- 50 percent of your job
2 might overlap. You each might have a unique 50 percent as
3 well. If you work together as a group, it's much easier to
4 come to consensus what that job broadly defined, might
13:31:52 5 entail.

6 However, when you're focusing on your individual job
7 as an individual with individual ratings, you're not taking
8 into account what other people working in that job might
9 actually do. So with that, you get measurement error, the
13:32:04 10 results of your independent ratings would be further removed
11 from what's performed in the actual job, than results of
12 consensus rating would be because you can discuss things and
13 share things about what you perform to help or understand
14 what you might be performing in your job.

13:32:20 15 Q. With regards to the job analysis that was performed
16 here in Akron, was it independent or consensus?

17 A. The validation report indicates that the ratings on
18 duties were independent.

19 Q. Is that consistent with other data you've seen
13:32:40 20 provided to you in this case from either Jacobs or Akron
21 about the job analysis?

22 A. I don't believe I've seen any data from the job
23 analysis. I have not.

24 Q. How about any statements -- any information provided
13:32:55 25 to you at all regarding the job analysis from Jacobs or an

1 employee of Jacobs?

2 A. Including defendant declarations?

3 Q. Sure.

4 A. Yes.

13:33:08 5 Q. Explain the difference. Go ahead.

6 A. Okay. The validation report says that the ratings
7 were independent. However, a declaration by Mr. Hinnish, I
8 believe is how you say his name, indicated that they were
9 actually consensus.

13:33:22 10 Q. And what happened -- well, what was the final report
11 prepared, do you remember?

12 A. The validation report?

13 Q. Yes. The validation report.

14 A. I believe the work was done in 2003 and the report was
13:33:37 15 printed or published or dated in 2004.

16 Q. Mr. Hinnish's declaration, what was that dated?

17 A. That would have been the last four months.

18 Q. After your deposition, sir?

19 A. That's correct.

13:33:53 20 Q. Are there any American psychological association
21 standards that relate as to what you must specify as to the
22 method used for job analysis, whether it be independent or
23 consensus ratings?

24 A. The APA standards specify -- it's not specific to job
13:34:24 25 analysis but any research or validation process, they

1 specify that it's important to identify whether or not it is
2 independent or consensus.

3 Q. For what reason?

4 A. There is nothing wrong with either one. But when
13:34:39 5 you're evaluating the work, it's really important that you
6 know which method was followed. Consensus is okay in some
7 circumstances, and independent ratings are okay in some
8 circumstances as well. But it's important that as an
9 evaluator that might be reviewing the research and the
10 validity information that you actually know.

11 Q. What impact does the job analysis have on component
12 weighting?

13 A. There is a number of ways to weight your selection
14 components. One of those ways would be based on the results
13:35:23 15 your job analysis.

16 Q. When we are talking about component weighting, define
17 for the jury what do you mean by component weighting, and
18 your spelling weighting W-E-I-G-H-T-I-N-G?

19 A. That's correct.

13:35:36 20 Q. So using it as that word. Okay. Explain what
21 component weighting is.

22 A. First of all, a component would be one selection
23 exercise or device. In this case, for example, one
24 components would be the knowledge test. Another component
13:35:51 25 would be the written work sample. A third component, the

1 oral boards. So these are the given components that were
2 used. Component weighting is when weights are actually
3 established and assigned to scores on each component. If
4 one component is more important than the other two
13:36:08 5 components, that will receive the highest weight. And this
6 together, the weights, the components that are weighted, are
7 summed together to perform an overall score.

8 Q. And what impact does job analysis have on the total
9 weighting?

13:36:29 10 A. The component that measures more important aspects of
11 the job as defined by the job analysis would receive a
12 higher weight.

13 Q. When was the component weighting for these tests
14 administered in Akron determined by E.B. Jacobs?

13:36:49 15 A. According to the validation report, the component
16 ratings were established after the job analysis but before a
17 test plan or before the actual tests were developed.

18 Q. Why is that significant to you?

19 A. They established weights for a test that did not yet
13:37:09 20 exist.

21 Q. So before the test had ever been defined, they were
22 establish being weights of components?

23 A. Yes, before the test was even developed, they
24 established the importance of the different components of
13:37:22 25 the test.

1 Q. How were the abilities defined? First you have the
2 tasks. Then that defines tasks and duties, if I understand
3 what you're saying. And then there is abilities. How were
4 those determined?

13:37:50 5 A. The abilities were presented to the subject matter
6 experts by E.B. Jacobs.

7 Q. Do you know where they came from?

8 A. Based on recent declaration, the ability were based on
9 the taxonomy of ability.

13:38:11 10 Q. Spell that.

11 A. T-A-X-O-M -- O-N-O-M-Y.

12 Q. What is a taxonomy?

13 A. A taxonomy is -- it's a listing of ability. This
14 particular taxonomy was called the grade eight taxonomy.

13:38:43 15 Q. What does that mean?

16 A. And this apparently is taxonomy of supervisory
17 abilities. So it's a listing of supervisory ability.

18 Q. In your typical job analysis, who determines the
19 abilities to be measured by the examination?

13:39:01 20 A. Both the uniform guidelines and the SIOP principles
21 indicate that subject matter experts, which would be the
22 incumbents or supervisors, actually identify the ability.

23 Q. In this case who identified the ability?

24 A. E.B. Jacobs offered the ability apparently from the
13:39:22 25 grade A text on my.

1 Q. Is there any indication in the information provided to
2 you that the subject matter experts had any input in the
3 determination of abilities that were going to be measured by
4 these exams?

13:39:39 5 A. The validation report simply indicates that they link
6 the ability to the work behaviors. It does not indicate
7 they have any input as they did with the tasks.

8 Q. Is that consistent with uniform guidelines and SIOP
9 principles?

13:39:54 10 A. The SIOP principles and uniform guidelines indicate
11 that the subject matter expert should be the ones creating
12 the ability or identifying the abilities.

13 Q. What impact, going back to rate weighting just for a
14 minute. What impact, sir, Dr. Brink, does weighting an
13:40:15 15 examination that does not yet exist have on the relation or
16 pertinence of those --

17 COURT REPORTER: I'm sorry. Can you repeat that.

18 MS. AMBROSE-RUBRIGHT: Objection.

19 THE COURT: I sustained the objection. I'm going
13:40:42 20 to ask the question either be withdrawn or rephrased.

21 MR. THOMPSON: I'll withdraw the question. That
22 way we don't have to worry about it.

23 Q. Doctor, do you have an opinion as to whether or not
24 the number of subject matter experts that were used to
13:41:18 25 develop the exams in this case were adequate?

1 MS. AMBROSE-RUBRIGHT: Objection.

2 THE COURT: Overruled.

3 A. I do not believe the sum of subject matter experts
4 that were used for either lieutenant or captain was
13:41:30 5 adequate.

6 Q. And explain what that opinion is based on, sir?

7 A. Assuming that, again, these are independent ratings,
8 there is an equation that you can use to calculate the
9 confidence, the list of confidence you have in independent
13:41:49 10 ratings given certain sample size.

11 Q. Okay. Let's talk about this just for a little bit.

12 If these are independent assessor ratings as E.B.
13 Jacobs indicates in the final report, are they subject to
14 some kind of statistical analysis?

13:42:04 15 A. Yes.

16 Q. You use some terms, confidence levels and so forth.
17 What sign of statistical analysis are independent
18 ratings amenable to being used?

19 MS. AMBROSE-RUBRIGHT: Objection.

13:42:16 20 THE COURT: Sustained, sir. Why don't you
21 rephrase the question?

22 MR. THOMPSON: Thank you.

23 Q. What kind of statistical analysis would be pertinent
24 to analyzing independent job ratings?

13:42:27 25 MS. AMBROSE-RUBRIGHT: Objection.

1 THE COURT: It's overruled.

2 A. I performed an analysis looking at that. I'm not sure
3 there is necessarily a name for that analysis. It looks at
4 the confidence level and margin of error of survey ratings.

13:42:39 5 Q. And that kind of analysis was derived from where, the
6 method that you used?

7 A. It's an equation that's -- you can derive it from
8 statistical textbooks that talk about probability and
9 sampling.

13:42:54 10 Q. And base on that analysis, how big should these SME
11 samples have been?

12 MS. AMBROSE-RUBRIGHT: Objection.

13 THE COURT: It's overrule. Based upon are
14 analysis in your opinion.

13:43:06 15 Q. In your opinion.

16 THE COURT: Why don't you rephrase the question,
17 based upon his knowledge, skill and experience in his
18 opinion, please. He is testifying as an expert, ladies and
19 gentlemen. He is giving his opinions based on the
13:43:16 20 underlying data in this case.

21 Q. Dr. Brink, in your opinion, based on your training,
22 skills and experience, and based on your education and your
23 evaluation of the data in this case, what should the number
24 of SME's have been with relation to each of these numbers?

13:43:37 25 A. I did the calculations in my report.

1 Q. I'm just looking for the numbers.

2 A. For an 80 percent confidence level, which is a really
3 a low confidence level -- ideally we look for 90 percent
4 confidence level -- but with the 80, I found that 29 subject
13:44:11 5 matter experts would be needed for fire lieutenant, and 15
6 subject matter experts would be needed for fire captain.

7 Q. Dr. Brink, do you have an opinion, sir, as to if the
8 examinations in this case can be demonstrated to be job rate
9 related or valid based on the job analysis?

13:44:40 10 MS. AMBROSE-RUBRIGHT: Objection.

11 THE COURT: It's overruled.

12 A. My opinion is that this test cannot be validated or
13 you cannot develop a valid test because the job analysis was
14 insufficient. As I said earlier, the job analysis is the
13:44:55 15 foundation for your test development process. If it's
16 insufficient, there would need to be foundation, and no
17 matter what kind of test you develop can't be valid.

18 Q. And the basis of for that opinion, sir, is -- you base
19 that opinion on what, sir?

13:45:13 20 A. On my review of the job analysis and some of the
21 things that we talked about.

22 Q. Was there any evidence from the information provided
23 to you that Jacobs & Associates considered any alternative
24 weighting -- call it schemes, I don't like that
13:45:40 25 word -- weighting alternatives?

1 A. E.B.J. proposed three weighting method in their
2 validation report. They name the methods and they
3 identified the weights but they didn't actually evaluate how
4 those weighting methods would have turned out with their
13:45:55 5 data.

6 Q. Did you evaluate those alternative weighting systems
7 or weighting schemes as proposed by E.B. Jacobs?

8 A. Yes, I did.

9 Q. And in those alternative weighting schemes that you
13:46:10 10 evaluated, did you prepare an analysis as to what the
11 outcome would have been had those weighting alternatives
12 been actually employed with relation to these tasks?

13 A. Yes, I performed those calculations.

14 MR. THOMPSON: Your Honor, these are the tables
13:46:28 15 in the supplemental report. We would like to introduce them
16 for the purpose of this examination if we could, please?

17 THE COURT: You may.

18 Q. Directing counsel to page 5 of the supplemental
19 report. In front of you is what is identified, sir, as
13:46:43 20 table 5. Let me know when you're there, please.

21 A. I'm there.

22 Q. Tell the jury what table 5 is, sir?

23 A. Table 5 compares adverse impact using four-fifths rule
24 or the impact ratio when using five different weighting
13:47:16 25 methods. And this is done for lieutenant on race.

1 If you look at the first column, you will see we're
2 looking at rank. This would be ranks on the test. So the
3 range here is ranks 21 through 35. The actual number of
4 ranks that were actually used in this test, the number of
13:47:41 5 people that were promoted was 28. So you can see the middle
6 row is bolded. That's rank 28, and that's where the actual
7 selections ended.

8 And we showed ranks 25 percent above and below where
9 they actually ended up. That's where we have ranks 21
13:47:58 10 through 35.

11 The next column shows adverse impact, again, using the
12 impact ratio with a method that was actually selected by
13 E.B.J.

14 Q. And when you say the second column, this column here?

13:48:13 15 A. It's the B -- it's the E.B.J. selected method.

16 Q. This one?

17 A. Yes, that's correct.

18 Q. And you can that screen when you want to circle
19 certain things, then tap it in the lower left corner to
13:48:29 20 clear. If you want to direct the jury to things, Doctor,
21 feel free, and then you can clear it.

22 MS. AMBROSE-RUBRIGHT: Objection, Your Honor.

23 THE COURT: Yes. Pose specific questions
24 regarding both the report, please, if you would, please.

13:48:41 25 Q. You were on column two. Explain the next column?

1 A. The next column, the sum of weighed means
2 meted -- actually, the next three columns were methods that
3 were named by E.B.J. in their validation report. They
4 actually name these methods. They determined the weights
13:49:10 5 that would apply to the components if they would have used
6 these methods in the validation report.

7 What we did is reanalyzed the data using these three
8 weighting methods that again E.B.J. identified.

9 Q. And what did you find?

13:49:25 10 A. We found in all cases that that adverse impact would
11 have been better or equal at all ranks, using all methods,
12 or to say it another way, E.B.J.'s method was equal to or
13 worse than all of the other method at all of the other ranks
14 in terms of the adverse impact.

13:49:49 15 Q. Is there another table in the report that addresses
16 this issue?

17 A. Yes. If you wouldn't mind, if we would back up to the
18 last column in that.

19 Q. Oh, okay. I'm sorry. So you're now at this column
13:50:04 20 here?

21 A. Just to recap, the first method was the method
22 actually selected by E.B.J. The next three columns were
23 weights they identified in their report but didn't actually
24 use or try. The last column is another method that's
13:50:19 25 sometimes used in test validation, and that's the dimension

1 weighted method. What this does is it assumes that we don't
2 really have components. Each of the components measures
3 certain abilities. What this does is it derives weights for
4 abilities instead of components. It's just another way to
13:50:38 5 calculate weights using test scores.

6 And this method like the other three resulted in less
7 adverse impact that was less than or equal to that of the
8 method chosen by E.B.J.

9 Q. Anything else that this chart shows to us?

13:50:59 10 A. Unfortunately, some of the values are bold and some of
11 them are not. I don't know if you can see that on your
12 screen.

13 THE COURT: Can you see it, ladies and gentlemen?

14 Q. Can you circle the ones that are bold?

13:51:26 15 A. Most of the values that fall below that line are
16 bolded. And those are where adverse impact was actually
17 more favorable than the E.B.J. method.

18 Another thing to point out --

19 MS. AMBROSE-RUBRIGHT: Objection, Your Honor.

13:51:42 20 THE COURT: Yes, sir. Just wait for another
21 question, please, sir.

22 Next question, please.

23 Q. Is there anything else that you want to demonstrate
24 with regards to this chart?

13:51:51 25 A. One final thing is you'll notice that -- especially in

1 the sum of weighted mean method, you will see several values
2 greater than or equal to .80. .80 is the cutoff for the
3 impact ratio. If the impact ratio is less than .8, there is
4 adverse impact. If it's .8 or greater, there is no adverse
13:52:14 5 impact. So what you can see is using the sum of weighted
6 means method, as well as the dimension weighted means
7 methods, would have resulted in several ranks that did not
8 have adverse impact.

9 Q. And what does table 6 show, sir?

13:52:40 10 A. Table 6 shows the exact same thing with respect to the
11 fire captain test. The same weighting methods. The captain
12 test promoted through rank 12. We once again went 25
13 percent above and below rank 12 which is ranks 9 through 15.

14 In almost all cases, adverse impact was better than
13:53:08 15 the E.B.J. method. There were only two values in this table
16 that are not bold which would mean that there are only two
17 values that are actually equal to adverse impact using the
18 E.B.J. method. That would be the two right here.

19 In every other case, adverse impact was -- there was
13:53:30 20 less adverse impact in the method chosen by E.B.J. And you
21 can also notice that at rank 12, the rank where hires
22 actually stopped, both the sum of weighted means method and
23 the dimension weighted means method would have resulted in
24 no adverse impact as evidenced by an impact ratio of .84
13:53:52 25 which again is greater than .8.

1 Q. What is required of any tester to do with regards to
2 looking for alternative methods?

3 A. A person who's developing a test should try and
4 identify alternatives before they start test developments.

13:54:22 5 And if there is adverse impact, they should also try to
6 determine or seek to determine if there are other
7 alternatives that could have been used that would have been
8 equally valid but would have resulted in less adverse
9 impact.

13:54:36 10 Q. Is that required also under the SIOP principles?

11 A. That's correct.

12 Q. And with regards to the alternative measures being
13 considered by any testers, in this case testing consultant,
14 is it required that they document what they have done?

13:54:49 15 A. That is correct.

16 Q. And is that also under the SIOP principles?

17 A. Yes.

18 Q. In the data that you reviewed in the final report or
19 in the validity report that was prepared by E.B. Jacobs, is
13:55:08 20 there any documentation anywhere of alternative measures
21 considered by E.B. Jacobs?

22 A. No, there is not.

23 Q. Do, you have an opinion on whether E.B. Jacobs
24 gathered ratings from the subject matter experts on relevant
13:55:37 25 work behaviors -- strike that question.

1 Do you have an opinion on whether E.B. Jacobs gathered
2 appropriate or adequate information from the subject matter
3 experts regarding work behaviors that are required day one?

4 A. They did not gather day one ratings as required by the
13:55:59 5 uniform guidelines.

6 Q. And upon what do you base that opinion, sir?

7 A. On validation report.

8 Q. What would you expect to see in the validation report
9 that would support a consideration that the testing

13:56:17 10 consultant in this case actually used the SME's to consider
11 day one ratings?

12 A. Well, they very clearly used it for the knowledge
13 sub-source ratings that actually had a day one rating scale
14 and they asked the subject matter experts to consider the
13:56:33 15 knowledges and whether or not they're needed at day one, so
16 they thought it was important for the knowledges, however,
17 they did not gather those same rating for duties or
18 abilities.

19 Q. Doctor, you have an opinion, Dr. Brink, do you have an
13:56:46 20 opinion as to whether the promotional examinations in this
21 case assessed a representative sample of the job domain?

22 A. I have an opinion.

23 Q. And your opinion is, sir?

24 MS. AMBROSE-RUBRIGHT: Objection.

13:57:01 25 THE COURT: It's overruled.

1 A. I do not think it assessed a representative sample of
2 the job domain.

3 Q. And why not?

4 A. For one, the job analysis, I do not think, fully
13:57:16 5 define the job domain. If you don't know the entire domain
6 is, then it's impossible to know if you have a
7 representative sample of that domain.

8 To give you an example, if I pull a --

9 MS. AMBROSE-RUBRIGHT: Objection.

13:57:28 10 THE COURT: Sustained.

11 Q. If you would, please, describe for the jury what an
12 example would be of a job domain that is adequately
13 represented by an examination?

14 A. If you permit me to use an example that's not related
13:57:55 15 to job analysis to clarify it.

16 Q. Please.

17 A. Suppose I pull a handful of jelly beans out of my
18 pocket and I asked if that handful of jelly beans was a
19 representative sample of my jar of jelly beans at moment.
13:58:07 20 How would you know that unless you knew what was in my jar
21 of belly jeans.

22 You would have to know what colors I have in my jar,
23 how many of those colors I might have in my jar, but you
24 can't know in my pocket all of the jelly beans as a
13:58:19 25 representative sample because you don't know what the entire

1 domain is.

2 The same thing occurs in a job analysis. If you don't
3 identify the entire domain, you simply can't know if you've
4 measured the representative sample of that domain.

13:58:34 5 Q. Doctor, you have an opinion as to whether alternative
6 measures, as far as assessments, were considered by E.B.
7 Jacobs in its testing process for lieutenant and captain?

8 A. No alternatives were considered.

9 Q. Ab you base that upon, sir?

13:59:04 10 A. The validation report identified the types of measures
11 that were used, but it identified no consideration of any
12 other types of measures.

13 Q. So there is no documentation provided?

14 A. That is correct.

13:59:17 15 Q. Do you have an opinion as to whether the assessment
16 process was impacted due to vague behavioral anchors?

17 A. Yes, I do.

18 Q. First of all, what's your opinion?

13:59:42 19 A. My opinion is that it was affected by vague behavioral
20 anchors.

21 Q. What do you base that opinion on?

22 A. Behavior anchors are --

23 MS. AMBROSE-RUBRIGHT: Objection.

24 THE COURT: Let's start with some foundation.

14:00:03 25 What is a vague behavioral anchor.

1 Q. Fair enough. What is a vague behavior anchor?

2 A. Let me start with the oral board. The oral board
3 test.

4 THE COURT: The question is what is a behavior
5 anchor? Start with that.

14:00:19

6 A. A behavioral anchor is used to help guide assessors
7 when they are rating candidates on a dimension.

8 Q. Let's talk about dimension. What is a dimension?

9 A. Dimension would be in the case of the oral board test,
10 one of the abilities that was measured in the oral board.

14:00:34

11 Q. And did you have a chance to review the behavioral
12 anchors that were used with these exams?

13 A. Yes, I did.

14 Q. And --

14:00:47

15 MR. THOMPSON: Your Honor, I'm going to direct
16 the witness to Exhibit 1030 which is a defense exhibits. It
17 was provided, and this is out of the assessor training
18 manual and we would request permission to publish this to
19 the jury, sir.

14:01:13

20 MS. AMBROSE-RUBRIGHT: No objection.

21 THE COURT: All right, sir. Go ahead and publish
22 it, please.

23 Q. This is defined as the oral board behaviorally
24 anchored rating scales, and this says oral expression. What
25 is this?

14:01:35

1 A. This is a listing of behavioral anchors that were used
2 to rate candidates on oral expression on the oral board
3 portion of the exam. At the top you can see number 9.
4 Number 9 would be the highest possible score in this
14:01:51 5 dimension and the behavioral anchor describing 9 would be
6 spoke in a clear, fluent and articulate manner.

7 If you go on down the list there is behavioral anchors
8 for ratings that would be assigned from 9 all the way down
9 through 1.

14:02:05 10 Q. Was it determined or could you determine from the
11 report from E.B. Jacobs how these rankings or behavioral
12 anchors were determined?

13 A. I did not know how they were determined.

14 Q. Exhibit 1030-32. It says interpersonal relation, and
14:02:37 15 these are behavioral anchors for this dimension? It should
16 be the very next page. Do you know where these behavior
17 anchors came from?

18 A. The report does not indicate where the anchors came
19 from. I'm sorry, when you say where they came from, the
14:03:13 20 documents in the appendicis, is that what you're asking?

21 Q. Yes. Or how these were determined. It there any
22 indication how these were determined?

23 A. No, there is not.

24 Q. Is there some of the information that would need to be
14:03:27 25 documented in a validation report?

1 A. Yes, it should be.

2 MS. AMBROSE-RUBRIGHT: Objection.

3 THE COURT: Well, I'll allow the question.

4 Counsel, please, nonleading questions, sir. Thank you very
14:03:37 5 much.

6 Q. Dr. Brink, tell us, if you would, please, what impact,
7 lack of documentation has on the ability of any
8 professional, such as yourself, to go back and assess these
9 examinations in terms of validity, content, or any of the
14:03:57 10 attributes that you have to determine whether the exam is
11 content valid?

12 A. The validation report would document the entire study
13 in enough detail that somebody else within the profession
14 could come replicate what was done. And this is specified
14:04:14 15 in the uniform guidelines and SIOP principles.

16 Q. Was that kind of documentation -- strike that.

17 The did that kind of documentation exist in this case?

18 A. No, it did not.

19 Q. As far as these behavioral anchors that we were
14:04:40 20 looking at, are the type of oral communication skills

21 example that are appropriate for one scenario applicable to
22 another scenario?

23 A. Not necessarily.

24 Q. Give an example of that, please?

14:05:06 25 A. Well, behavior related to a dimension in one context

1 might be different or appropriate behavior related to a
2 particular dimension or ability in one context may differ
3 from another. An example would be interpersonal skills in
4 the courtroom, here, appropriate incident personal skills in
14:05:23 5 the courtroom maybe very different than appropriate
6 interpersonal skills at a party, for example.

7 Q. So it sounded like you just used interpersonal skills
8 as a generic terms that just goes across the board?

9 A. Right, to the degree that the dimension related
14:05:41 10 behavior may different across exercises, you should reflect
11 that. Different scenarios would perhaps require different
12 types of dimension-related behavior.

13 Q. Is there anything in the validation report that
14 indicates that these behavior anchors were somehow rooted in
14:05:59 15 the job analysis?

16 A. There is no indication of that.

17 Q. And when you say that these were vague behavioral
18 anchors, what do you mean by that?

19 A. They were not sufficiently specific to the particular
14:06:20 20 exercises or components. In fact, they were identical
21 across the different oral board exercises. And across
22 lieutenant and captain. Behavioral anchors were the same
23 regardless of the component or the job level.

24 Q. So the behavioral component, for example, oral
14:06:39 25 expression for the group exercise was identical as it was

1 for the subordinate conference was identical as it was for
2 the incident command?

3 A. That's correct.

4 Q. And do you have an opinion, sir, as to whether that
14:06:52 5 was appropriate?

6 A. Yes, I do.

7 Q. And that opinion is?

8 A. It's not appropriate.

9 Q. And that goes back to the context that you were
14:06:58 10 talking about just a few minutes ago?

11 A. That's correct. It should be more specifically
12 related to the particular exercise that the candidates are
13 performing.

14 Q. In performing the analysis that needs to be done to
14:07:10 15 establish the context for these dimensions, how do you do
16 that?

17 A. What we usually do is, at the personnel board is when
18 we are developing exercises with the subject matter experts,
19 we would have to develop we would have them develop bench
14:07:32 20 marks that are used synonymously in each of those exercises.
21 So once they develop the exercise, we have them develop
22 behavior anchors that reflect each of the ability as
23 reflected in that particular exercise.

24 So would hardly ever have the same exercise -- excuse
14:07:50 25 me, the same dimensions across exercises, have the same

1 bench marks or behavioral anchors.

2 Q. So you define the behavioral anchors first based on
3 the context exercise?

4 A. We first identify what abilities we're trying to
14:08:13 5 assess. We develop an exercise to reflect those abilities,
6 then we develop behavioral anchors to score a person on
7 those particular abilities in the context of that exercise.

8 Q. And we saw on the sheets that we just put up, the
9 stuff we just put up, we saw the term dimension. Explain
14:08:36 10 that to the jury, please.

11 A. The dimension in an exercise is nothing more than the
12 ability from the job analysis. So the job analysis
13 identified ability, and the dimensions in the test were
14 actually the same thing as the abilities. So they're
14:08:51 15 synonymous term.

16 Q. Dr. Brink, do you have an opinion if there was any
17 basis for rank ordering the candidates in this exam?

18 A. Yes, I do.

19 Q. And that opinion is?

14:09:13 20 A. There was no documentation in the validation report to
21 support rank ordering.

22 Q. And you base that conclusion on what, sir?

23 A. Based on E.B.J. validation report.

24 Q. And specifically what from Jacobs' validation report
14:09:31 25 do you base that conclusion?

1 A. Well, there was nothing in there to specify that it
2 was appropriate. The guidelines and principles would
3 suggest that if you are going to rank people based on test
4 scores, you have to specify your rationale for being able to
14:09:47 5 do that, and it has to be documented.

6 Q. And was there any documentation in the final report
7 that indicated to you that rank ordering was appropriate in
8 this case?

9 MS. AMBROSE-RUBRIGHT: Objection.

14:09:59 10 THE COURT: It's overruled.

11 A. There was no documentation to support the use of rank
12 ordering in this case.

13 Q. Doctor, I'm going to present to you some of the
14 exhibits that have been used or are being used in this case
14:10:18 15 relating to consolidation rating forms. And specifically,
16 I'm going to start with 68-7. And this is the Akron Fire
17 Department oral board lieutenant incident command rating
18 form. Do you see that?

19 A. Yes.

14:10:38 20 Q. As you look at these rating forms for this particular
21 candidate, and this particular one is Kerry Briggs who's one
22 of the plaintiffs in this case, can you ascertain from the
23 information here what justifies the ratings of the assessors
24 in this case?

14:10:57 25 MS. AMBROSE-RUBRIGHT: Objection.

1 THE COURT: Counsel, why don't we approach?

2 (Discussion at side-bar as follows:)

3 MS. AMBROSE-RUBRIGHT: This is the first time
4 that that has ever come up that he reviewed consolidated
14:11:20 5 rating forms. This is the first time that there has been
6 any indication that this witness is going to review
7 consolidated -- consolidation rating forms, give some
8 opinion on whether or not a particular candidate is
9 appropriate, not appropriate. To our knowledge, that's
14:11:42 10 never been anywhere that he examined those documents.

11 MR. THOMPSON: He did identify them in his
12 deposition testimony.

13 MS. AMBROSE-RUBRIGHT: For his expert report.

14 MR. THOMPSON: What he is talking about, exactly
14:11:53 15 the documents he reviewed, that were produced that includes
16 these?

17 MS. AMBROSE-RUBRIGHT: Did you send all of these
18 to him and he said he reviewed these before he gave his
19 expert opinion?

14:12:02 20 MR. ELFVIN: These are among some of the
21 documents he reviewed questions.

22 MS. AMBROSE-RUBRIGHT: And he listed these in his
23 expert report?

24 MR. THOMPSON: So he said he received the stuff
14:12:10 25 from City of Akron. These are among the documents he

1 reviewed. We are trying it right back to the behavioral --

2 MS. AMBROSE-RUBRIGHT: When did he review those
3 documents?

4 MR. THOMPSON: When he came up.

14:12:18 5 THE COURT: Didn't he already testify that he
6 reviewed them. He found them inadequate.

7 MR. THOMPSON: Yes, he did.

8 THE COURT: Well, I think that's sufficient.

9 MR. THOMPSON: That's fine.

14:12:27 10 MS. AMBROSE-RUBRIGHT: Thank you.

11 (The following proceedings were had in the hearing of
12 the Jury:)

13 THE COURT: Just so it's clear for the record in
14 the interest of time, let me address this very briefly. I
14:12:40 15 apologize to counsel. I do not mean to take over the
16 examination.

17 Doctor, is this an example of some of the
18 documentation that you reviewed that you found -- or that
19 you found to be inadequate? Is the document that's placed
14:12:51 20 in -- put it on the screen so he can see it.

21 THE WITNESS: I haven't examined the document.

22 THE COURT: You have or have not?

23 THE WITNESS: I have not.

24 THE COURT: You have not examined it before
14:13:01 25 today?

1 THE WITNESS: I may have seen it, but I have not
2 examined it closely.

3 THE COURT: All right. Just a second, ladies and
4 gentlemen, we are going to do the following: I can see that
14:13:09 5 some of you perhaps are a bit tired. We are going to take a
6 break. We are going to take about 15 minutes. Let me clear
7 this matter up.

8 You're free to bring coffee in the courtroom, ladies
9 and gentlemen, coffee, refreshments, anything you would
14:13:20 10 like. We will take 15 minutes and we will reconvene here
11 shortly. Thank you very much.

12 THE DEPUTY CLERK: All rise.

13 (Jury out, 2:10.)

14 THE COURT: So I completely understand here, the
14:13:54 15 document -- put the document in front of him on the screen.
16 Put it on the screen, the document you just had before him,
17 just for a second so that I can make sure that I understand
18 this. I want to make sure the doctor understands as well.

19 MR. THOMPSON: This one.

14:14:10 20 THE COURT: Have you seen this document before
21 today, sir?

22 THE WITNESS: I've seen documents like this.
23 Whether I've seen this specific one or if this is something
24 specific about this particular document, I haven't examined
14:14:23 25 this.

1 THE COURT: You have not examined this document
2 before today?

3 THE WITNESS: I've seen several documents like
4 this. I don't know whether I have or have not seen this
14:14:29 5 particular one. I haven't examined it in depth.

6 THE COURT: All right. Then I'll just simply --

7 MR. THOMPSON: That's all. I'll take this --

8 THE COURT: You're not going to present it any
9 further?

14:14:41 10 MR. THOMPSON: Correct.

11 THE COURT: All right. Step down, take a break,
12 ladies and gentlemen. One of our jurors, I don't want to
13 identify the specific juror, but I can see she's tired and
14 dozing so that's another reason I adjourned for a break and
14:14:54 15 instructed the jurors to perhaps gather coffee if they wish.

16 Thank you very much. You can step down.

17 (Recess taken, 2:15.)

18 (Jury in, 2:30.)

19 THE COURT: All right, counsel, you may resume
14:33:39 20 your direct examination of the witness, please.

21 MR. THOMPSON: Thank you, Your Honor.

22 Q. Dr. Brink, I asked you the question earlier about
23 whether you had an opinion whether this exam assessed
24 behaviors.

14:33:50 25 I'm going to ask you the same question as to

1 knowledges. Do you have an opinion, sir, as to whether
2 these promotional examinations assessed appropriately the
3 knowledges required to do either of these positions?

4 MS. AMBROSE-RUBRIGHT: Objection.

14:34:03 5 THE COURT: It's overruled.

6 A.

7 THE COURT: Do you have an opinion.

8 THE WITNESS: Yes.

9 THE COURT: All right, sir.

14:34:10 10 Q. And that opinion is?

11 A. It was not an adequate sample of knowledge.

12 Q. And what do you base that opinion on, sir?

13 A. 40 percent of the knowledge that was rated as critical
14 was not measured. And also, the test measured two -- two
14:34:33 15 thirds of the test measured knowledge that was -- that had
16 to be memorized.

17 Q. Just stop for a second. First off, the 40 percent of
18 critical behaviors, how are you defining -- or where are you
19 getting the definition of -- strike that.

14:34:49 20 What is a critical behavior?

21 A. By critical, I mean, knowledges that were rated as
22 critical by the subject matter experts in the job analysis.

23 Q. And when you say that 40 percent of those critical
24 behaviors were not assessed, how did you determine that,
14:35:05 25 sir?

1 A. I counted the number of behaviors that were rated as
2 critical. I calculated how many were assessed, how many
3 were not. I did the math and came up with 40 percent.

14:35:19 4 Q. And then you were talking about -- I think you said
5 something about memorization?

6 A. Yeah, the subject matter experts rated knowledge on
7 memorization scale.

8 Q. What does that mean?

9 A. The scale had three values. Did the knowledge have to
14:35:35 10 be -- can the knowledge be referenced all the time, can it
11 never be referenced on the job, does it have to be
12 memorized, in other words, or is it 50/50, can it be
13 referenced half the time, and does it have to be memorized
14 half the time?

14:35:51 15 And according to the validation report, the test only
16 measured items that had to be memorized. It was a closed
17 book test. However, the items -- when looking at the items
18 that were actually on the test, two thirds of them were
19 rated as having to be memorized all the time. One-third as
14:36:09 20 rated as having to be memorized half the time and would be
21 referenced half the time.

22 Q. What does that mean? Knowing that you have two thirds
23 that had to be memorized all the time and one-third that
24 could be referenced. What does that mean? Well -- did I
14:36:23 25 state that right? One-third is how much, one-third?

1 A. One-third was the 50/50 reference.

2 Q. Okay.

3 A. Memorized.

4 Q. Okay. And the other two thirds was?

14:36:32 5 A. Had to be memorized 100 percent of the time.

6 Q. What does that mean?

7 A. Well, since it was a closed book test, it's really
8 inappropriate to measure knowledge that can be referenced 50
9 percent of the time. What they should have done is, once

14:36:48 10 they graded the test, for those items that measured

11 knowledge that can be referenced 50 percent of the time,

12 they should have determined whether or not those specific

13 items measures those knowledges had to be memorized.

14 Q. Did they do that?

14:37:02 15 A. No, they did not.

16 Q. Was there anything in the final report or any of the

17 data sets that were produced to you that indicated that

18 there was any kind of analysis between items that had to be

19 partially memorized or fully memorized were taken into

14:37:17 20 consideration in creating this exam. Either of these exams?

21 A. Well, as I indicated previously, the validation report
22 indicated --

23 COURT REPORTER: I'm sorry.

24 A. The validation report indicated that the knowledge

14:37:39 25 test measured only items that had to be memorized 100

1 percent of the time. However, that was not the case.
2 Actually, one-third of the items on the test actually
3 measured items that could be referenced 80 percent of the
4 time.

14:37:54 5 Q. And the impact that has on this examination and the
6 assessment of its validity, sir?

7 A. What happens is there is -- or what happened here is
8 that there is a systematic bias in the items. As I said
9 earlier, you want a representative sample of items, not a
14:38:11 10 small portion of item from the entire domain.

11 What happened here is that the test focused on only
12 items that had to be memorized. It excluded critical items,
13 40 percent of the critical items that didn't have to be
14 memorized. So there is a systematic unrepresentative sample
14:38:29 15 of items that were used on this knowledge test.

16 Q. And how would you, if you were assessing those
17 critical behaviors that had some nonmemorized -- in other
18 words, that could be referenced, how would you assess that
19 kind of behavior in a promotional examination?

14:38:45 20 A. There are a number of ways that you can assess
21 knowledge. One way they could have done it, through an open
22 book test. They could have still used a multiple choice
23 test. It could have been open book. Another way is through
24 creating scenarios that might require knowledge, just like
14:39:01 25 scenarios that require abilities. They might also require

1 knowledge or application of knowledge. That would be
2 another good way of measures knowledge. There is a number
3 of ways it can be measured?

4 Q. Are these standardized testing procedures?

14:39:14 5 A. Yes, they are.

6 Q. In your review of the documents and review of the data
7 that was provided to you from E.B. Jacobs and in reaching
8 your conclusions that we asked you about in this case, did
9 you review the written work sample?

14:39:42 10 A. Yes, I did.

11 Q. Did you have any concerns with regard to that?

12 MS. AMBROSE-RUBRIGHT: Objection.

13 THE COURT: Sustained.

14 Q. Describe for the jury, if you would, please, what your
14:39:53 15 analysis of the written work sample entailed?

16 A. Okay. We began by ensuring that the work sample
17 adequately assessed the ability that it was supposed to
18 assess. And --

19 Q. Did it?

14:40:13 20 A. I did not feel it did.

21 Q. Why?

22 A. In particular, the written work sample purported to
23 measure interpersonal skills, and I don't think that the
24 writing task sufficiently measured interpersonal
14:40:26 25 interactions with other people.

1 Q. The consolidation rating forms for the written work
2 sample, did it also include the dimension of oral
3 expression?

4 A. I do not recall.

14:40:43 5 Q. Would you have to see that document to get that
6 recollection, Doctor?

7 A. Yes.

8 MR. THOMPSON: Request permission to approach
9 Your Honor.

14:41:09 10 THE COURT: Yes, you may.

11 Q. Dr. Brink, what I've handed you is one of the
12 lieutenant written work sample consolidation rating forms.
13 Have you had a chance to review that now, as far as to the
14 dimensions?

14:41:28 15 A. Yes.

16 Q. Does that refresh your memory as to whether there was
17 an oral expression dimension that was being assessed in the
18 written work sample?

19 MS. AMBROSE-RUBRIGHT: Objection.

14:41:40 20 THE COURT: That's overruled. I'll allow him to
21 use it to refresh his recollection. Go ahead.

22 A. The first dimension listed on here is, in fact, oral
23 expression.

24 Q. I'll take that back. Thank you.

14:41:51 25 Did E.B. Jacobs provide in his final report or in any

1 of the data that was provided to you, how a written work
2 sample could assess oral expression?

3 A. I don't believe I've seen -- I have not seen anything
4 in the report indicating how it can assess oral expression.

14:42:22 5 Q. In all your experience in testing, sir, in your
6 education, do you have an opinion -- I'm sorry -- can a
7 written work sample assess oral expression?

8 A. I can't think of any conceivable way it can measure
9 oral expression in a written exercise.

14:42:43 10 Q. What was the reliability of the written work sample in
11 this case?

12 A. In our analysis of dimensions that were assessed in
13 the written work sample, we found the reliability ranged
14 from .62 to .73.

14:43:24 15 Q. Interpret those, if you would, please, what does that
16 computation mean to you?

17 A. Reliability can range from zero to one. One would be
18 the perfectly reliable test. Zero would be a perfectly
19 unreliable test. A .62 is not a very high reliability
14:43:48 20 especially when there was multiple on one component.

21 Q. What kind of reliability statistic would you expect to
22 see for high stakes testing?

23 A. There is different ways of looking at reliability so
24 it's difficult for me to answer that question.

14:44:09 25 Q. Okay. I'll withdraw the question.

1 In Jefferson County, the oral assessment exercises,
2 when you administer them there, how are they rated? How is
3 that done? Describe for the jury that, please?

4 A. How assessors rate.

14:44:31 5 Q. Yes.

6 A. When assessors rate candidates they watch a videotape
7 of the candidate and they block two person panels. They'll
8 listen to a person or a candidate respond to the question.
9 And as they are rating, so they'll take notes on that
14:44:45 10 response. When the response is over, they will compare
11 their notes to the behavior anchors that were designed for
12 that specific exercise and they will make a independent
13 rating.

14 Once they make the preliminary rating, this is an
14:45:00 15 independent rating. Once they make the independent rating,
16 they will discuss the rating amongst each other and come up
17 with a final rate.

18 Q. Again, we are talking independent like we talked about
19 before, independent ratings are those kind of ratings
14:45:15 20 that -- well, explain. What's an independent rating?

21 A. Independent rating in this case would be they watch
22 the candidate, they make their rating. There is no
23 interaction with their partner whatsoever.

24 Q. Consensus rating is different than that?

14:45:29 25 A. That's right. Once they make their independent

1 rating, they will discuss what they did. And if they didn't
2 match, they will reach consensus.

3 Q. So once in Jefferson County, once they reach the
4 independent assessment, what happens then?

14:45:43 5 A. Once they reach their independent rating, they will
6 discuss the ratings, and they will circle a final rating,
7 and that will be the rate that go we actually give to the
8 candidate.

9 Q. That's the consensus rating done at the end?

14:45:57 10 A. That's correct.

11 Q. So the independent ratings are done first and then you
12 end up with a final rating after the consensus is drawn
13 together?

14 A. That's correct.

14:46:04 15 Q. Were you aware in this case that Dr. Jacobs formed or
16 standardized scores as to panel differences for the
17 assessors in this case?

18 A. Yes, that's what's indicated in the validation report.

19 Q. Explain that to the jury. What are we talking about?

14:46:28 20 A. What happened here is some of the panels scored
21 candidates on average higher than other panels. Because of
22 that, they tried to correct more it statistically by
23 recalculating the scores in the panel that was significantly
24 higher so that it would be in line with other panelist
14:46:49 25 scores.

1 Q. Was that appropriate strategy or was that an
2 appropriate technique based on the type of assessment
3 centers that Dr. Jacobs administered here?

4 A. Assuming the ratings were independent as described in
14:47:03 5 the validation report and training materials, I do not
6 believe that that was an appropriate step to take.

7 Q. Why?

8 A. Since the ratings are independent, there is no
9 mechanism that would cause -- perhaps --

14:47:25 10 Q. Let me ask you a question. If the ratings are
11 independent, that means each assessor is doing their own
12 rating?

13 A. That's correct.

14 Q. So the scores are not measured by panel?

14:47:34 15 A. That's correct.

16 Q. Would there be any justification for adjusting by
17 panel if the scores were not arrived at on a consensus
18 basis?

19 MS. AMBROSE-RUBRIGHT: Objection.

14:47:43 20 THE COURT: I'll allow the question. Go ahead.

21 A. If the ratings are truly independent, the concept of a
22 panel really doesn't exist. It just happens to be three
23 independent people in the same room seeing the same
24 candidate. It's not possible to have what's called panel
14:47:58 25 drift.

1 Q. Panel drift you called that?

2 A. Panel drift occurs -- going back to --

3 MS. AMBROSE-RUBRIGHT: Objection.

4 THE COURT: Counsel, I guess -- I'll allow the
14:48:13 5 question. Go ahead. Tell us what panel drift is quickly,
6 please.

7 A. Panel drift occurs when you're working with other
8 people and you're talking about your ratings, you begin to
9 see things more similar to one another than what you would
14:48:28 10 to other panels that you are not working with. So if you
11 stay working together all day, you may start drifting from
12 what the rest of the panels may be doing and that's referred
13 to panel draft.

14 That occurs when your ratings are not independent.
14:48:42 15 Theoretically there's no reason for that to occur when your
16 ratings truly are independent.

17 Q. Is there any way to avoid panel drift in those kinds
18 of scoring system where there is consensus rating? How can
19 you avoid that?

14:48:55 20 A. We avoid panel drift by rotating our assessors so they
21 don't develop those habits, for lack of a better word. They
22 work with somebody for a couple of days. Then we rotate
23 them to work with somebody else, and they won't begin to
24 drift away.

14:49:11 25 Q. Is there any indication in any of the reports that

1 were provided to you, or data, that indicated that these
2 assessors were rotated in the manner you just described?

3 A. The assessors were not rotated.

4 Q. The reliability as to the other assessor -- assessment
14:49:27 5 exercises other than the written exercise to which you've
6 already testified, what was the reliability you determined
7 for those exercises, sir?

8 A. For which exercises are you talking about?

9 Q. The other assessment exercises, both ranks,
14:49:43 10 subordinate conference, group conference and the incident
11 command?

12 A. I'm not sure I calculated those.

13 Q. Okay. Dr. Brink, what is Type I error?

14 A. In the case of this case or in the case of adverse
14:50:17 15 impact, Type I error would be incorrectly concluding that
16 adverse impact exists.

17 Q. And what would Type II error be?

18 A. Type II error would be the opposite error. That would
19 be incorrectly conclude that go adverse impact does not
14:50:34 20 exist.

21 Q. In your analysis, would it be appropriate to
22 use -- well, strike that.

23 Describe for the jury if you would, please, what an
24 inferential statistic is?

14:50:44 25 A. An inferential statistic is a general category of

1 statistics that is used to make inferences about a
2 theoretical population.

3 Q. And what's a descriptive statistic?

4 A. A descriptive statistic is used to describe data.

14:51:05 5 Q. What are some examples of inferential statistics?

6 A. Inferential statistics would include a Chi-square
7 analysis, regression analysis, statistical called NOVA,
8 there is a number of inferential statistics.

9 Q. One of the underlying is assumptions for the use of
14:51:30 10 inferential statistics, what are some that must exist in
11 order for inferential statistics to be appropriate to be
12 used at to any set of data?

13 A. It should be based on a sampling distribution, some
14 type of sampling distribution. Mechanisms of deriving a
14:51:49 15 sample from the population.

16 Q. Which means what?

17 A. Well, a population is a theoretical concept. When we
18 ask hypothesis, we talked about much earlier today, when we
19 are trying to answer research questions, our questions are
14:52:02 20 usually about some type of population, within the U.S.,
21 within the City of Akron, so the hypothesis that we're
22 testing are regarding the population. However, we can
23 hardly ever sample the population -- excuse me. We can
24 hardly gather data from be everyone that might be in
14:52:21 25 population so what we do is we pull a sample from that

1 population. So inferential statistics analyze the sample
2 data we have to answer questions about a population.

3 Q. Does the sample have to be random?

4 A. The more random the sample, the more accurate the
14:52:43 5 statistical result.

6 Q. Fair enough.

7 Was the sample in this case, those selected, was that
8 a random selection?

9 A. No, it was not.

14:52:51 10 Q. What kind of selection was this?

11 A. A selection -- by selection meaning sampling.

12 Q. Sampling, what kind of sampling was this?

13 A. It wasn't random because in this case the population
14 was very narrow and those people who expressed an interest
14:53:10 15 in applying for the job that were qualified.

16 Q. Are you familiar with the term top down?

17 A. Top down selection?

18 Q. Yes.

19 A. Yes.

14:53:16 20 Q. What is that for the jury, please.

21 A. That's when you hire people -- it's when you
22 administer a test, rank people on the test based on their
23 score, and then hire top down beginning with rank one
24 beginning with the highest score and working your way down
14:53:31 25 the list.

1 Q. And with Type I error, how do you determine that.
2 That's the false negative or false positive of it?

3 A. I don't like to use the terms negative and positive,
4 but a Type I error incorrectly concluding adverse impact
14:53:46 5 exists when its do not.

6 Q. How do you compute that?

7 A. Type I error is computed by the inferential
8 statistical test. What we do, we determine the level of
9 error that we're comfortable with by choosing what's call an
14:54:03 10 alpha value. And historically the most commonly used alpha
11 value would be .05. What that would mean, given this
12 population, if I do my analysis, if I chose an alpha level
13 of .05, 95 percent confidence that the differences I obtain
14 in the sample are not due to chance.

14:54:24 15 Q. And how do you compute Type II error? And Type II
16 arrow again is?

17 A. Type II arrow would be incorrectly conclude that go
18 adverse impact does not exist when it actually does.

19 Q. And how do you compute that?

14:54:37 20 A. You can't actually -- well, Type II error is computed
21 by actually calculating what's called power.

22 Q. And what is that?

23 A. Type II error -- excuse me, power would be another
24 decision. Power is correctly concluding that adverse impact
14:54:56 25 exists when it, in fact, does. So Type II error would be

1 equal to power -- excuse me. Type II error is equal to one
2 minus power. So there is a perfect inverse relationship
3 between power and Type II error.

4 Q. In all of the data that Dr. Jacobs had in his final
14:55:14 5 report, any of the data sets that were provided to you did
6 he compute power as to Type II error?

7 A. No, he did not.

8 Q. In all the data that you saw from Dr. Jeanneret, did
9 he compute power as to Type II error?

14:55:27 10 A. No.

11 Q. Did you review any computations relating to power to
12 either of those -- to either rank of lieutenant and captain?

13 MS. AMBROSE-RUBRIGHT: Objection.

14 THE COURT: It's overruled.

14:55:38 15 A. Yes, I have.

16 Q. Without specifying the amount, what did that data
17 reveal to you?

18 A. The power was low.

19 Q. How low?

14:55:56 20 MS. AMBROSE-RUBRIGHT: Objection.

21 MR. THOMPSON: Let me withdraw that question.
22 I'll withdraw at that question.

23 Based on what you saw, Dr. Brink, were there problems
24 with the power relating to the statistics that were used in
14:56:14 25 this case by Dr. Jeanneret or Type II error, I'm sorry.

1 A. Given the low power, that would mean it's a very high
2 probability of making a Type II error.

3 Q. Which would be making the wrong decision or
4 interpretation of that data?

14:56:32 5 A. Yes.

6 MS. AMBROSE-RUBRIGHT: Objection.

7 THE COURT: Sustained, disregard the question,
8 ladies and gentlemen.

9 Q. What does that mean, Dr. Brink?

14:56:37 10 A. Type II error would be incorrectly concluding that
11 adverse impact does not exist when this, in fact, does.

12 MR. THOMPSON: If I could have a moment, please,
13 Your Honor.

14 THE COURT: You may. Anything further of this
14:57:47 15 witness, please?

16 MR. THOMPSON: Yes.

17 Q. Dr. Brink, all your opinions in this case are based on
18 application of SIOP principles?

19 A. They would include SIOP principles.

14:58:01 20 Q. Uniform guidelines?

21 A. Correct.

22 Q. Other principles espoused by the American Psychiatric
23 Association?

24 A. That's correct.

14:58:08 25 Q. And you talked about content validity being one

1 strategy. Other types of validation strategies would be
2 like example?

3 A. Criterion validity, be looking at the correlation
4 between your test and job performance. Looking at the
14:58:29 5 internal structure of the test -- I'm just going to throw
6 terms out, using factor analysis, there is five strategies
7 outlined in the SIOP principles, three strategies outlined
8 in the uniform guidelines.

9 Q. Were any of those, based on the data that you saw,
14:58:45 10 considered or used in this case?

11 A. No, they were not.

12 Q. Doctor, if you would, please, go to your report and
13 then your supplemental report. I'm going to direct your
14 attention to the last two pages of your report, please, sir.

14:59:19 15 Have we addressed during this testimony here all of your
16 opinions that you expressed or laid out there?

17 MS. AMBROSE-RUBRIGHT: Objection.

18 THE COURT: Sustained, counsel. I'm not sure of
19 the purpose of the question. I don't want to comment
14:59:38 20 further.

21 MR. THOMPSON: No further questions.

22 THE COURT: Thank you.

23 Counsel, you may cross-examine.

24 CROSS-EXAMINATION OF KYLE BRINK

14:59:51 25 BY MS. AMBROSE-RUBRIGHT:

1 Q. Good afternoon, Dr. Brink.

2 A. Good afternoon.

3 Q. We have met before; is that correct?

4 A. Yes, that's correct.

14:59:56 5 Q. And, Dr. Brink, you were describing high fidelity
6 testing, and as lawyers, we take bar examinations to become
7 lawyers, are you aware of that?

8 A. Right.

9 Q. And to become a lawyer, I had to pass a bar
15:00:12 10 examination and I sat in a room and I took a very long
11 multiple choice test call the multi-state examination. Are
12 you familiar with that at all?

13 A. I'm familiar with certification tests, not that
14 particular one.

15:00:25 15 Q. So when I sat down and took this multiple choice
16 multi-state test to determine whether or not I could become
17 a lawyer, I was taking a very low fidelity test; is that
18 correct?

19 A. That's correct.

15:00:36 20 Q. So even though it was a low fidelity test, it didn't
21 mean they could not make a decision on whether or not I
22 could be a lower or not; isn't that true?

23 A. I wouldn't know that without examining the validation
24 evidence for that test.

15:00:49 25 Q. So the validation evidence is what determines whether

1 or not the test is good, for lack of a better term, or bad;
2 is that right?

3 A. Right, the validation evidence is very well defined,
4 yes.

15:01:05 5 Q. So whether or not a test as high fidelity or low
6 fidelity, really doesn't answer the question of whether it's
7 valid or not; isn't that true?

8 A. It's one of many factors.

9 Q. It doesn't answer the question of whether it's valid
15:01:17 10 or not, isn't that true, just the mere fact of fidelity?

11 A. As I indicated earlier, if the test has higher
12 fidelity, it would be considered more valid than if it had
13 lower fidelity, but that's just one factor.

14 Q. So you condition base validation on just the fact that
15:01:33 15 a test is high fidelity; isn't that correct?

16 A. That's correct.

17 Q. In this particular case, you have submitted a report
18 under the name of Centrus; is that correct?

19 A. That's correct.

15:01:43 20 Q. And who's Centrus?

21 A. Centrus is a firm that was form by myself and two of
22 my coworkers.

23 Q. And when you say two of your coworkers, you're talking
24 about two of the other Ph.d.s, IO psychologists in Jefferson
15:01:56 25 County?

1 A. That's right.

2 Q. And you decided to form Centrus when Attorney Thompson
3 call you to get involved in this case; is that correct?

4 A. We had been thinking about forming a company for quite
15:02:11 5 some time. We decided to form a LLC since this was our
6 first contract or first business, yes.

7 THE COURT: Make sure the question is, sir.

8 Q. Would you answer my question? You formed Centrus
9 after Attorney Thompson called you to get involved in this
15:02:27 10 case; isn't that correct?

11 A. Yes.

12 Q. And you told me that you decided to form this and
13 become an expert consulting firm, and you worked out of one
14 of the other IO psychologist's houses and you call
15:02:42 15 yourselves Centrus; is that right?

16 A. Yes.

17 THE COURT: Counsel, why don't you slow down a
18 little bit for the court reporters? Again, I appreciate the
19 pause, but just take your time.

15:02:55 20 MS. AMBROSE-RUBRIGHT: I'm trying to hurry as
21 much as I can. I apologize, Your Honor.

22 THE COURT: There is no -- take your time.
23 Whether you're in a hurry or not isn't going to help the
24 court reporters transcribe it and the jurors can't follow
15:03:07 25 it.

1 BY MS. AMBROSE-RUBRIGHT:

2 Q. If you would go to your vitae, please. It's Exhibit
3 1064, or you may have the one that Mr. Thompson identified.

4 And when you prepared this vitae, you have research
15:03:35 5 and invited presentations on page -- the first page. Do you
6 see all those items?

7 A. Yes.

8 Q. And then you continue on the next page, page 2, and
9 you have another list of items under the heading of research
15:03:54 10 and invited presentations; is that correct?

11 A. That's correct.

12 Q. And the one that I have a highlighted check next to is
13 your only published research; is that correct?

14 A. Yes, that's correct.

15:04:09 15 Q. And in this one piece of research that you've
16 conducted, you are the third author; is that correct?

17 A. Yes.

18 Q. And that has some significance in the world of
19 publication and peer reviewed articles; isn't that correct?

15:04:25 20 A. What do you mean by significance?

21 Q. That you're listed third instead of first. Does that
22 have some significance with regard to the article?

23 A. Authors are listed in order of contribution to the
24 paper.

15:04:41 25 Q. So you are the third contributor to this article; is

1 that right?

2 A. That's correct.

3 Q. Is this the first time in your career as an IO
4 psychologist you've ever conducted any kind of evaluation of
15:04:54 5 adverse impact based on age?

6 A. Yes.

7 Q. Is it common when you do these presentations to SIOP,
8 the Society of Industrial Organizational Psychology, that
9 when you do these presentations that you later submit your
15:05:21 10 presentations for publication?

11 A. Some of them, yes.

12 Q. Have you ever done that?

13 A. No.

14 Q. You list also in your vitae -- if we can go back to
15:05:38 15 it. And I'm going to direct you to pages -- it's page 5 of
16 your vitae. You have select technical reports, and you have
17 listed a considerable number of technical reports. And you
18 also continue with that list of technical reports on page 7
19 in your vitae; is that correct?

15:06:05 20 A. Just so you know, I actually have a different copy
21 than you have, but that appears to be correct, yes.

22 Q. So you may have added a few more technical reports
23 since you gave this to me?

24 A. Yes.

15:06:18 25 Q. Regardless of whether you added more technical reports

1 since you gave this to me or not, all of these technical
2 reports are things that you do in your job for Jefferson
3 County; is that right?

4 A. That's correct.

15:06:30 5 Q. And these are not publications that are peer reviewed
6 or examined for publication by your peers, isn't that right?

7 A. Correct.

8 Q. And there are also confidential documents by virtue of
9 an actual section in these reports that say that they are
10 also not for publication; is that right?

11 A. I do not know.

12 Q. Haven't you written them?

13 A. I don't recall a confidential section.

14 Q. We'll go there a little bit later. We will move on.

15:07:05 15 Have you ever developed a promotional examination for
16 any position in a safety force that is based on a written
17 examination, a written technical job knowledge test?

18 A. No.

19 Q. So all of your testimony and criticism of what Dr.
15:07:27 20 Jacobs did is something you have never done; is that
21 correct, Dr. Brink?

22 A. That's correct.

23 Q. And this case is the very first promotional
24 examination in a safety force that you've ever analyzed
15:07:45 25 outside of Jefferson County; is that correct?

1 A. That's correct.

2 Q. You told me that one of the plaintiffs in this case, a
3 gentleman by the name of Bradley Carr, furnished you some
4 information about the testing process and gave you some
15:08:08 5 summaries of information; is that correct?

6 A. I received some materials from Bradley Carr, yes.

7 Q. And you told me when you looked at those materials you
8 examined them with a grain of salt; is that right?

9 A. Correct.

15:08:20 10 Q. And you've not used them in any way, shape or form to
11 form any of the opinions that you've just given me; is that
12 correct?

13 A. To my knowledge, that's correct.

14 Q. Jefferson County, where you work, actually hired Dr.
15:08:38 15 Jeanneret to develop tests for Jefferson County; is that
16 correct?

17 A. We hired Jeanneret & Associates which is his
18 consulting firm.

19 Q. Well, he's the president and CEO, isn't he?

15:08:48 20 A. Right.

21 Q. And Dr. Jeanneret actually came down to where you work
22 and developed tests; is that right?

23 A. Dr. Jeanneret didn't personally involve himself in the
24 work.

15:08:58 25 Q. But his firm was?

1 A. That's correct.

2 Q. Okay. But Dr. Jeanneret, you told me, that you met
3 him because he spoke to you about the SIOP principles and
4 the revision of those principles; is that correct?

15:09:09 5 A. That's correct.

6 Q. And Dr. Jeanneret, as you know, was the chairman of
7 the revision of those principles; is that correct?

8 A. Yes.

9 Q. And you would agree with me that Dr. Jeanneret is a
15:09:23 10 well regarded and imminent expert in the field of industrial
11 psychology; is that right?

12 A. Yes.

13 Q. And what's it take to become a fellow in the
14 organization of the Society of Industrial and Organizational
15:09:39 15 Psychologists?

16 A. I believe you have to be nominated by other fellows
17 which is usually something that happens later in your
18 career.

19 Q. Have you ever been nominated for that?

15:09:49 20 A. No, I have not.

21 Q. Have you ever seen the complaint in this case that was
22 filed in Court?

23 A. I don't believe I have.

24 Q. Did any of the plaintiffs or Mr. Thompson indicate to
15:10:04 25 you before you even did your report that there was adverse

1 impact on these examinations?

2 A. I do not recall.

3 Q. You testified about a lot of defects in the final
4 report of Dr. Jacobs, and this information wasn't there,
15:10:25 5 this avenue wasn't documented, I didn't have enough
6 information about this. I couldn't tell about that.

7 Can you tell me, Dr. Brink, how you can express any
8 opinion about the validity of this examination if all these
9 things are missing?

15:10:40 10 A. There was lots of information in the validation
11 report, some of it was missing information that was
12 necessary to form an opinion on the validation. Some of it
13 was there. The fact that some of the information was not
14 there, by itself, would allow me to form the opinion that
15:11:01 15 it's not valid. The missing information in some cases was
16 missing because it wasn't done.

17 Q. Did you ask for more information?

18 A. I know we submitted some requests. I don't recall
19 what those were.

15:11:18 20 Q. Who submitted some requests? If you needed all this
21 information, did you ask for it, and how did do that?

22 A. We asked for additional appendices early on that we
23 haven't received a report. Right when this all started we
24 asked for additional information. Since then I don't
15:11:33 25 believe we asked for additional information.

1 Q. Are you telling me that you did not receive the
2 appendices to the final report that Dr. Jacobs prepared?

3 A. The confidential appendices.

4 Q. You have never seen the confidential appendices?

15:11:47 5 A. Initially, the first thing I received was the
6 validation report and not confidential, I have seen and
7 reviewed the confidential appendices but that was one of the
8 things I asked for during the litigation.

9 Q. So you received all the documents that are related to
15:12:02 10 the final report, including the appendices and including the
11 confidential appendices listed at the front of the report;
12 is that correct?

13 A. That's correct.

14 Q. Did you ask for more information?

15:12:14 15 A. Not that I recall.

16 Q. Were there questions that you had that you wanted
17 answered by Dr. Jacobs so that you could explore some of
18 these avenues where there was not sufficient documentation?

19 A. Some of the inconsistencies were --

15:12:42 20 Q. Do you want me have the question reread to you, Dr.
21 Brink?

22 A. Yes, please.

23 Q. Perhaps that might help you.

24 THE COURT: Madam court reporter, if you read
15:12:54 25 loudly for the ladies and gentlemen.

1 (Record read.)

2 A. I don't recall any specific questions that I had.

3 Q. Dr. Brink, you talk about errors, Type I, Type II. Is
4 the four-fifths rule subject to considerable sampling error?

15:13:24 5 MR. THOMPSON: Objection.

6 THE COURT: It's overruled.

7 A. Yes.

8 Q. So even when you did these analysis of adverse impact
9 that you based on four-fifths rule, it has the same type of
10 error possible represents, isn't that be correct?

11 A. The same type of errors but in the opposite direction.

12 Q. But it has the same type of problems? It has errors.
13 It just depends on whether it's Type I or Type II, isn't
14 that correct?

15:13:55 15 A. That's correct, yes.

16 Q. And in fact four-fifths rule is very susceptible to
17 very small sample size; isn't that correct?

18 A. Yes.

19 Q. So when we have small sample sizes, this four-fifths
15:14:12 20 rule as to adverse impact, not adverse impact depends on how
21 many people you promote or select; isn't that correct?

22 A. It could, it could not.

23 Q. But it depends on the number you select. So if this
24 week we promoted ten individuals, we could calculate this
15:14:27 25 four-fifths rule, and it potentially could demonstrate

1 adverse impacted based on four-fifths rule; is that correct?

2 A. Potentially.

3 Q. And then a month from now, we can decide that we need
4 ten more people promoted and then we would recalculate
15:14:44 5 adverse impact and maybe at that point it might be
6 different; isn't that correct?

7 A. Potentially.

8 Q. At the end of the day, you can't finally determine
9 whether or not based on four-fifths rule, until -- it cannot
15:14:59 10 be based -- excuse me. Let me rephrase the question.

11 Until you're finished promoting, until you're finished
12 hiring, you can't calculate a final determination based on
13 four-fifths rule; is that correct?

14 A. If you're talking the overall use of the test, that's
15:15:21 15 correct.

16 Q. What do you mean overall use of the test? I just gave
17 you an example. I'm asking you, Dr. Brink, if you're
18 looking at an examination and you're calculating four-fifths
19 rule based on how you calculated it in this test, which is
15:15:39 20 the number promoted, we never know whether there is adverse
21 impact or not until we're completely done promoting; isn't
22 that correct?

23 A. That's correct.

24 Q. So when we give a test, there is no way to determine
15:15:57 25 whether or not there is a four-fifths rule violation or not

1 because we don't know how many people are going to get hired
2 or promoted from that list; isn't that correct?

3 A. Yes.

4 Q. And in this particular case, do you have any idea how
15:16:11 5 the number of 28 lieutenants came up on the lieutenants exam
6 and 12 captains were promoted? Do you know where those
7 numbers were determined?

8 A. That's how many were promoted.

9 Q. My question is, do you know how those numbers came
15:16:25 10 about, that the City of Akron said we're going to promote 28
11 lieutenants. We're going promote 12 captains?

12 A. I would assume it's based on the number of vacancies.

13 Q. And do you know whether it depends upon funding?

14 A. Perhaps.

15:16:41 15 Q. Does it in Jefferson County?

16 A. Yes.

17 Q. Wouldn't you say it's a fair statement that you have
18 no idea on the final number of individuals that will be
19 promoted or hired until all of those variables are finally
15:16:57 20 determined, the number of vacancies, the number of
21 retirements, the number of resignations?

22 A. No.

23 Q. How else would you determine it?

24 A. You said no idea. I think you can have a pretty good
15:17:12 25 idea based on past use of lists, past hires.

1 Q. So we can determine four or five years later, after a
2 prior list that was established, how many people we're going
3 promote?

4 A. Your question said no idea. I'm saying you can make a
15:17:30 5 reasonable estimate based on the past hires over the last
6 few years.

7 Q. Using your four-fifths rule calculations, you can't
8 tell me the probability of making a wrong conclusion based
9 on four-fifths rule; is that correct?

15:17:50 10 A. You can estimate that.

11 Q. Can you tell me the probability that you're wrong
12 based on your four-fifths rule?

13 A. I can't answer that question as asked.

14 Q. You were talking about the power of the analysis, of
15:18:16 15 the statistical test being low. If we wanted to make the
16 statistical analyses done on these examinations, we would
17 have to add more candidates; isn't that correct?

18 A. Add more candidates for what purpose?

19 Q. Who took the exam. If we want better statistics, in
15:18:37 20 your estimation because the power is low, we would have to
21 make it so that more people took the lieutenant's test and
22 more people took the captain's test?

23 A. That's one way of increasing power.

24 Q. Do you have any idea how we could possibly do that
15:18:53 25 when only 112 people signed up for the lieutenant's test and

1 44 people signed up for the captain's? Are we supposed to
2 go out and recruit people to get our numbers up?

3 MR. THOMPSON: Objection. Argumentative.

4 THE COURT: Sustained. Disregard the question,
15:19:08 5 ladies and gentlemen.

6 BY MS. AMBROSE-RUBRIGHT:

7 Q. How do you suggest that we increase our numbers to get
8 better power?

9 A. Your numbers are what they are.

15:19:17 10 Q. So we can't change it. It's just an observation of
11 yours based on the number of people who signed up for the
12 test; is that correct?

13 A. What's an observation?

14 Q. Your power, that it's low or high or good or bad, or
15:19:32 15 medium or whatever you want to characterize it as, is an
16 observation about the data as it exists? We can't change
17 that in this data; is that correct?

18 A. Right. The power calculation is for this specific
19 sample, this specific data.

15:19:49 20 Q. And I can't increase it because I can't make more
21 candidates in this candidate pool, can I?

22 A. Once your data is collected, you can't increase it.

23 Q. You did not calculate four-fifths rule based on
24 passing rates; is that correct?

15:20:08 25 A. That's correct.

1 Q. But you do do that in Jefferson County, don't you, Dr.
2 Brink?

3 A. Yes.

4 Q. And in Jefferson County you also look at the mean
15:20:19 5 score differences between black and white candidates, males
6 and females; is that correct?

7 A. That's correct.

8 Q. And you analyze whether or not there is adverse impact
9 based on those exact calculations, mean score differences
15:20:34 10 and passing rates; isn't that correct?

11 A. No, it's not correct.

12 Q. I'm going to ask you to go to exhibit --

13 MS. AMBROSE-RUBRIGHT: If I could take a
14 moment, Your Honor.

15:20:50 15 THE COURT: Yes, you may.

16 Q. If you could find Exhibit 109, Dr. Brink, 8?

17 THE COURT: Which exhibit?

18 MS. AMBROSE-RUBRIGHT: 1098.

19 THE COURT: Defendants?

15:21:15 20 MS. AMBROSE-RUBRIGHT: That's correct, Your Honor
21 you don't have that?

22 A. What is it?

23 Q. Exhibit 1098?

24 A. What's the title.

15:21:32 25 Q. He is entitled Content Validation Report, Police,

1 Sheriffs, Sergeant, January 2008 and has a list of
2 individuals on the front including your name?

3 A. I don't have a copy of that.

4 Q. Let's me find that for you.

15:22:14 5 MR. THOMPSON: May I approach the witness, Your
6 Honor?

7 THE COURT: Yes, you may.

8 A. Could you repeat the number, please?

9 Q. Yes, it's Exhibit 1098. Are you there, Dr. Brink?

15:23:00 10 A. Yes.

11 MS. AMBROSE-RUBRIGHT: Your Honor, may I publish
12 this?

13 THE COURT: Any objection?

14 MR. THOMPSON: No.

15:23:05 15 THE COURT: All right. Go ahead. You may.

16 Dr. Brink, this is a contend validity report that you
17 are one of the authors of; is that correct?

18 A. That's correct.

19 Q. And this is from your job in the personnel board of
15:23:29 20 Jefferson County; is that right?

21 A. Yes.

22 Q. And this is not included in your vitae; is that
23 correct? This isn't one you listed?

24 A. It may not be in the copy that you have.

15:23:41 25 Q. Is it in the copy that Mr. Thompson gave you?

1 A. No, that was older.

2 Q. I'm sorry, I cannot hear you?

3 A. No, it was not.

4 Q. So this isn't listed anywhere in all of the technical
15:23:50 5 reports that you listed in your vitae; is that right?

6 A. Without looking at it, I would say I don't know.

7 THE COURT: Well, if you want to take a minute
8 and look.

9 Take a minute and look at it, sir. Do you have it in
15:24:04 10 front of you?

11 THE WITNESS: I have an older copy than what you
12 have so I have to look at ours.

13 THE COURT: For the ease of the witness, I have
14 what I believe is the more recent version which is
15:24:13 15 Plaintiff's Exhibit 143. I believe this version, ladies and
16 gentlemen of the jury, has been updated, to set forth the
17 doctor's, all of the things -- more current information than
18 at the time of his deposition which was given some months
19 ago.

15:24:28 20 THE WITNESS: Actually, this is the older
21 version, sorry.

22 THE COURT: Well, I guess I have the older
23 version, too. Who has the newer version?

24 MR. THOMPSON: Exhibit 143, Your Honor.

15:24:38 25 MR. ELFVIN: It was identified today. It on page

1 2, Your Honor.

2 MS. AMBROSE-RUBRIGHT: May I?

3 THE COURT: The one I have in my hand is marked
4 as Plaintiff's Exhibit 143.

15:24:47 5 A. That's the older -- the one you put on the screen as
6 older.

7 THE COURT: It doesn't matter. Give him the new
8 one if you have it please. Thank you.

9 A. No, I do not see it listed.

15:25:13 10 Q. I'm going to show you what is on page 29 of that
11 report, but it's marked in Exhibit 1098, and it's 1098-28.

12 Do you see that?

13 A. Yes.

14 Q. And I'm looking at the adverse impact results for race
15:25:34 15 and for sex. Do you see that, Dr. Brink?

16 A. Yes.

17 THE COURT: Can you read it, ladies and gentlemen
18 of the jury? You'll need to make it larger for the benefit
19 of the jury, please. Thank you. Are you all right? All
15:25:47 20 right. Thank you.

21 Q. And it says screen adverse impact results for race in
22 table four, screen adverse impact results for sex in table
23 5; is that correct?

24 A. You skipped the MQ, but other than that, that's
15:26:05 25 correct, yes.

1 Q. And in these tables, you're looking at the number of
2 individuals who passed the test and failed the tests; is
3 that correct?

4 A. Yes, that's correct.

15:26:14 5 Q. And there is also a calculation that says impact
6 ratio. Isn't that what we're talking about here,
7 four-fifths rule?

8 A. Yes, that's the same thing.

9 Q. So back in Jefferson County when you did this validity
15:26:28 10 report, you were looking at adverse impact in calculating
11 four-fifths rule based on passing rates; is that correct?

12 A. For the minimum qualification test, is that correct.

13 Q. In this same report, you represent also that you
14 conduct assessor training for your assessors; is that
15:26:57 15 correct?

16 A. Yes.

17 Q. And how long is your assessor training?

18 A. Sometimes depends on the exercise, but it's usually
19 about a day.

15:27:05 20 Q. Do you know how long the assessor training was here in
21 this testing process?

22 A. I believe it was a day and a half.

23 Q. And, again, in this -- and I'm going to direct your
24 attention to Exhibit 1098-8. This is from the same report.

15:27:34 25 In your job analysis data for this particular position

1 that you did this validity report for, you used an old job
2 analysis from 2003; is that correct?

3 A. Yes.

4 Q. And it says that whoever this group was, the Yusko
15:28:00 5 group, had done an earlier job analysis, so you were just
6 confirming it; is that correct?

7 A. That's correct.

8 Q. And how many SME's did you use to confirm that earlier
9 job analysis?

15:28:12 10 A. We confirmed it during the test development process.
11 If you give me a minute, I can try and determine the number
12 of SME's that were in the test development.

13 Q. Well, let me ask you this question. You know how you
14 gave us this formula about how to calculate how many SME's
15:28:37 15 are necessary, did you do that here? Did you do this
16 formula that you came up with to calculate the number of
17 necessary SME's to participate in a job analysis? And did
18 you do that here?

19 A. Well, the job analysis was done in 2003.

15:28:53 20 Q. My question is, you were reaffirming the job analysis,
21 am I correct, with SME's?

22 A. Reaffirming, yes.

23 Q. And when you were reaffirming this job analysis, did
24 you use that formula that you've just told the jury about?

15:29:13 25 A. No.

1 Q. Calculated how many SME's you need?

2 A. No, I did not.

3 Q. Do you know how many lieutenants and captains are on
4 the Akron Fire Department?

15:29:31 5 A. Page 8 of my first report indicates how many were in
6 the Akron Fire Department as of 2005.

7 Q. So you reported those numbers?

8 A. Yes.

9 Q. And they are?

15:30:05 10 A. There were 80 fire lieutenants and 17 fire captains.

11 Q. Do you know what our total strength is in those ranks?

12 A. No.

13 Q. When you're in Jefferson County -- you operate under a
14 consent decree. There's already been testimony about that.

15:30:25 15 So you have very high scrutiny of what you do in Jefferson
16 County; is that correct?

17 A. Yes.

18 Q. And that has been the case for many, many years in
19 Jefferson County, isn't that correct?

15:30:35 20 A. Yes.

21 Q. And you work for the County Personnel Board, and you
22 have about 28 plus or minus industrial psychologists; is
23 that right?

24 A. Currently it's around 20.

15:30:49 25 Q. So you've been cut in staff?

1 A. Yes.

2 Q. And those -- you do jobs for all of Jefferson County
3 from clerical workers through public safety positions; is
4 that correct?

15:31:01 5 A. Yes.

6 Q. So the types of jobs that you study are various
7 different jobs; is that right?

8 A. Correct.

9 Q. And do you give high fidelity video testing to all of
10 those jobs?
15:31:13

11 A. Yes.

12 Q. And you built a rather state-of-the-art video center
13 to do this, didn't you?

14 A. Yes.

15:31:23 15 Q. And it cost millions of dollars to build this center
16 for Jefferson County, didn't it?

17 A. I do not know what it cost.

18 Q. Expensive? Is that a fair statement?

19 MR. THOMPSON: Objection.

15:31:35 20 THE COURT: It's overruled.

21 A. I have no idea what it cost.

22 Q. When you analyze your tests in Jefferson County, if
23 you calculate this four-fifths rule, do you still go ahead
24 and do statistical tests?

15:31:52 25 A. Yes.

1 Q. Do you promote or hire in Jefferson County even if
2 there is a four-fifths rule violation?

3 A. Yes.

4 Q. You're aware that there are no statistically
15:32:07 5 significant mean differences in the components of the
6 lieutenant's examination; is that correct?

7 A. I believe so.

8 Q. And on this captain's examination, you are aware that
9 there is no significant difference in the final scores of
15:32:26 10 black and white candidates; is that correct?

11 A. I did not calculate it, but I believe that's what was
12 found.

13 Q. And in Jefferson County when you're looking at adverse
14 impact, you also examined mean score differences in
15:32:39 15 determining whether or not there is adverse impact; is that
16 correct?

17 A. No.

18 Q. Do you want to go back to Exhibit 1098?

19 Are you there?

15:33:19 20 A. Yes.

21 Q. I'm going to ask you to go to page 40. I'm looking at
22 what's table 15 in your report, and here you're calculating
23 mean scores, am I correct?

24 A. Yes.

15:33:57 25 Q. On item and dimension descriptive statistics?

1 A. Yes.

2 Q. And you are also looking at the mean scores of black
3 and white candidates; is that correct?

4 A. Yes.

15:34:08 5 Q. And you also, if I look at T test and P value, you are
6 calculating, whether or not it is statistically significant,
7 if there are statistically significant differences between
8 black and white candidates? And you're looking at the
9 in-basket and the roll call and the role play and the
10 situational judgment test; is that correct?

11 A. Yes.

12 Q. And do you evaluate that to see whether or not there
13 is or is not adverse impact?

14 A. No.

15:34:39 15 Q. So you just do those calculations for the heck of it
16 and don't consider it, whether in your scoring --

17 A. If I could explain my response. We do mean
18 differences, but mean differences do not indicate whether or
19 not there is adverse impact. Adverse impact is based on
15:34:54 20 select, not mean differences. So we do form calculations
21 and it's informative about mean differences, but we don't
22 use that to form conclusions on adverse impact.

23 Q. Do you use it to determine how you're going to weight
24 a test?

15:35:08 25 A. No.

1 Q. Do you use it to take out specific portions of a test?

2 A. Perhaps.

3 Q. And in Jefferson County, if your description of what
4 you told me -- and my recollection is correct, before you
15:35:25 5 give any test in Jefferson County, you don't tell the
6 candidates what the weight of any component on that test is,
7 am I correct?

8 A. Yes.

9 Q. And then at the end, after all the candidates have
15:35:36 10 taken it, and you look at the adverse impact of all the
11 different components, you decide on a weighting system that
12 reduces adverse impact; is that correct?

13 A. Yes.

14 Q. So you get to decide, after the fact, after the
15:35:53 15 candidates have taken the test, how you're going to weight
16 the test to make sure it looks good for adverse impact; is
17 that correct?

18 A. Yeah, we determine the most appropriate weighting
19 strategy as we analyze the data.

15:36:07 20 Q. Have you ever tried to do that outside of Jefferson
21 County in safety forces like the City of Akron Fire
22 Department, the Akron Police Department, or any other
23 community that is not under Court oversight?

24 A. No.

15:36:18 25 Q. You were questioned regarding the different weighting

1 methods or the fire lieutenant's examination, do you recall
2 that on direct, Dr. Brink?

3 A. Yes.

4 Q. And I'm referring to Defendant's Exhibit 1086-4; is
15:36:59 5 that right? That's where you explored different weighting
6 schemes?

7 A. I don't have the numbers, I'm sorry, but this is the
8 document that you have up.

9 Q. The document that I have up is from your expert
15:37:13 10 report?

11 A. Yes, September 7 -- or excuse me --

12 Q. It's table 5 in your expert's report?

13 A. Yes.

14 Q. And you explored ranks 21 through 35; is that correct?

15:37:29 15 A. Yes.

16 Q. And when you look at these numbers, what these numbers
17 tell me is that we go from adverse impact, .68 -- and you
18 can look across all the numbers and go down the columns. So
19 would go from adverse impact at 21, and then there is, in
15:37:54 20 these ranks, 21 through 28, we have adverse impact; is that
21 correct?

22 THE COURT: Can you read it, ladies and gentlemen
23 of the jury? All right. Thank you.

24 A. Yes, there is adverse impact at ranks 21 through 28.

15:38:12 25 Q. And then magically when we go to rank number 29, one

1 person different, we don't have adverse impact. Isn't that
2 correct?

3 A. Yes, there is no adverse impact at rank 29.

4 Q. So we can look at all these scores and they can go up
15:38:28 5 and down, there is adverse impact, there isn't adverse
6 impact, and it just depends on how many people you promote;
7 isn't that correct?

8 A. That's one of the factors it depends on.

9 Q. But it changes? It goes up and down?

15:38:43 10 A. Yes.

11 Q. When you have small sample sizes, four-fifths rule is
12 quite volatile, is it not?

13 A. It's more volatile when there is small samples than
14 when this is large samples.

15:39:15 15 Q. And these two pools of candidates for lieutenant,
16 captain, are small sample sizes, are they not?

17 A. Captain might be small -- lieutenant is it?

18 Q. Captain might be small?

19 A. Captain is a small sample. Lieutenant is a pretty
15:39:30 20 decent sample.

21 Q. You were talking about calculating the number of SME's
22 that has to participate in a job analysis. Do you recall
23 talking about this formula, and we had to have 29 SME's for
24 the lieutenant's exam and some other large number for the
15:39:59 25 captain's exam job analysis. Are you familiar with that

1 testimony that you gave earlier?

2 A. Yes.

3 Q. Are you familiar with a book by Brannick & Levine
4 called Job Analysis?

15:40:36 5 A. I haven't read it.

6 Q. Are you familiar with the book and whether or not it
7 is in any way, shape or form an authority on job analysis
8 and how to conduct them?

9 A. I haven't read it so I wouldn't be able to answer that
15:41:09 10 question.

11 Q. Would it surprise you if Brannick & Levine, who have
12 written an entire book about job analysis and SME's said
13 that --

14 THE COURT: He's not familiar with it, counsel.
15:41:22 15 There is an objection. I'll sustain it. Thank you. Next
16 question.

17 Just for the record, the Court will note even though
18 the objection wasn't stated verbally, counsel stood and I
19 assume he was going to raise an objection. So it was
15:41:36 20 somewhat anticipatory. I sustained the objection.

21 Q. We were talking about reliability and I wanted to ask
22 you about first level supervisory positions such as
23 lieutenant. Based on your experience in Jefferson County,
24 do you have any idea whether or not -- I'm sorry, it's not
15:41:56 25 about reliable. It's about adverse impact. Whether or not

1 you expect adverse impact to occur more frequently at the
2 first level of supervisory promotions?

3 A. It's hard to say, I think it would depend on the
4 context that you're in.

15:42:14 5 Q. Did you examine the reliability of the written job
6 knowledge test that was given here?

7 A. You said the job knowledge, the multiple choice test?

8 Q. Yes.

9 A. I did not calculate that for reliability.

15:42:30 10 Q. Did you read in the final report what the reliability
11 figure was on the written job knowledge test?

12 A. Yes, I've seen the -- I've seen what it is, the
13 reliability estimate.

14 Q. And there was a very high reliability for that test,
15:42:44 15 was there not, Dr. Brink?

16 A. I don't recall what the number was.

17 Q. If I told you it was in the high 80s, would that
18 surprise you?

19 MR. THOMPSON: Objection.

15:42:57 20 THE COURT: Well, counsel, why don't you
21 rephrase --

22 MS. AMBROSE-RUBRIGHT: I'll withdraw the
23 question.

24 THE COURT: Either withdraw it or present him
15:43:05 25 with an exhibit that would confirm what you're saying,

1 please. Thank you.

2 Q. Did you look at any of the reliabilities of the
3 assessment center oral boards for either lieutenant or
4 captain?

15:43:19 5 A. I computed reliability for the written work sample,
6 and I've seen reliability estimates that were in the report.

7 Q. And based on your examination of the reliabilities
8 reported on those oral assessment exercises, those were in
9 your estimation above the .70 that you consider an
10 acceptable reliability; is that correct?

11 A. Did you say just the oral board?

12 Q. Yes.

13 A. I believe it was above the .7.

14 Q. And you told me that .7 and above is acceptable in
15 your estimation; is that correct?

16 A. Ideally would be in the area --

17 THE COURT: Is .7 -- that's not the question.
18 Read back the question.

19 (Record read.)

15:44:14 20 A. It depends on what you're estimating reliability for.

21 Q. Do you recall me asking you a question in your
22 deposition, and you telling me --

23 THE COURT: Before you do that, refer to page and
24 line. Do you recall at the time I took your deposition you
15:44:31 25 were asked this question and this answer was given. Please

1 do it in that fashion for the benefit of all of us, please,
2 all the listeners, and the record.

3 You're referring now to page?

4 MS. AMBROSE-RUBRIGHT: I'm referring to page 86
15:45:12 5 in your deposition at line 7.

6 "Q. What's the range for a diverse group of
7 knowledge sources, what in your opinion are acceptable
8 levels of reliability?"

9 "A. In my opinion, I would be concerned if my
15:45:33 10 reliability was below .7. Beyond that I cannot recall a
11 specific range. I have to consider a number of factors."

12 And you were speaking about the job knowledge test; is
13 that right.

14 A. I don't have it in front of me, but I believe that's
15:45:48 15 what you initially read, if that's what it says.

16 Q. And is that reliability the same reliability that you
17 would expect in oral board assessment exercises?

18 MR. THOMPSON: Objection, Your Honor.

19 THE COURT: It's overruled.

15:46:04 20 A. Again, the only way I can answer that is if I explain
21 the types of reliability that you might be looking at on
22 this test.

23 THE COURT: Counsel, if you can't answer the
24 question as posed -- why don't you rephrase the question?
15:46:17 25 Counsel, why don't you restate it or rephrase it?

1 MS. AMBROSE-RUBRIGHT: I'm going withdraw the
2 question, Your Honor.

3 THE COURT: All right. Thank you.

4 BY MS. AMBROSE-RUBRIGHT:

15:46:30 5 Q. You talk about research you did on time studies and
6 its relationship to whether or not there were difference.
7 Do you recall that in your testimony?

8 A. Yes.

9 Q. How many people did you study to make your
15:46:41 10 conclusions?

11 A. I do not recall.

12 Q. Was it a small sample?

13 A. I simply do not remember.

14 Q. It's true, is it not, Dr. Brink, that if there is not
15:47:12 15 adverse impact on these examinations, there is no
16 requirement in the uniform guidelines to demonstrate
17 validity; is that correct?

18 A. Yes.

19 Q. So all these complaints you have about all the
15:47:26 20 different job analyses points that you've made, are not
21 relevant if there is not adverse impact on these two
22 examinations?

23 A. Yes.

24 Q. When you do job analyses, do you ever go to the
15:47:50 25 Internet and look at O Net?

1 A. Yes.

2 Q. And O Net tells you things about different jobs; is
3 that correct?

4 A. Yes.

15:47:58 5 Q. And if you go to the internet and do that, do you
6 think it's reasonable for an industrial psychologist to rely
7 on prior job duty and task analyses in other cities that
8 they actually did?

9 A. Yes.

15:48:16 10 Q. And you know that that's what Dr. Jacobs did here?

11 A. If that's your only job analysis step, I would say --

12 THE COURT: The question is do you know whether
13 Dr. Jacobs did that here?

14 A. Dr. Jacobs used information from prior analyses.

15:48:38 15 Q. And do you know whether or not his prior experience in
16 other cities across the country, when he developed these
17 duty and tasks lists, whether or not those were the result
18 of these job analysis questionnaires that you said you do in
19 Jefferson County?

15:48:54 20 A. I do not know how I do derive that information.

21 Q. Do you know in the City of Akron that when we promote
22 people to lieutenant and captain, that the very next day
23 they take over that job?

24 A. I'm not aware of the procedure here in Akron.

15:49:14 25 Q. Are you aware that we don't have a training program,

1 that is, we're going to promote you today and you go through
2 a six-month training program to become lieutenant or
3 captain? Are you aware of that?

4 A. I've read that in Dr. Jeanneret's report.

15:49:29 5 Q. So we have no training academy for those people.
6 You're aware of that; is that correct?

7 A. Assuming Dr. Jeanneret's statement is correct, yes.

8 Q. So you don't know personally. You're relying on that?

9 A. Right.

15:49:40 10 Q. And that would then indicate to you, would it not,
11 that when that person goes into work the next day from a
12 firefighter to a lieutenant, they're expected to do that
13 job, know that job, and have the ability to do that job? Or
14 is it something we can learn later?

15:49:57 15 A. Is this a yes or no question?

16 Q. Is it something you can learn later, or are you
17 expected to know how to do the job the next day?

18 A. You assume the role of the job the next day, if
19 that's -- assuming that's correct.

15:50:17 20 Q. Have you examined the proposals that were submitted by
21 other industrial psychologists in this case to do this
22 testing for fire lieutenant and fire captain?

23 A. Have I seen them?

24 Q. Yes.

15:50:53 25 A. No.

1 Q. Do you know whether or not before this examination was
2 given that other industrial psychologists submitted
3 proposals with different components for the position of fire
4 lieutenant and fire captain?

15:51:10 5 A. No.

6 Q. Do you know what a panel review session is?

7 A. Could you describe it? Depends on context.

8 Q. I'm asking if you know, is that term familiar to you?

9 A. It may be the same as what we call focus group.

15:51:37 10 Q. In Dr. Jacobs' final report he describes his SME
11 panels where they went over job tasks, duty tasks and made
12 these ratings as panel session?

13 A. Okay.

14 Q. Having said that to you, do you know whether or not
15:51:55 15 the people in these panel sessions discussed the duties,
16 abilities, tasks that needed to be performed by captains and
17 lieutenants?

18 A. According to the validation report, it says they
19 discussed the tasks and did independent ratings on duties,
15:52:15 20 abilities, and knowledge language and, but they also
21 discussed or had consensus ratings on the three subsections
22 ratings of knowledge, which included day one, memorization
23 or whatever the third scale is. I don't recall.

24 Q. Dr. Brink, do you know what an Akron Fire Department
15:52:38 25 lieutenant or captain does?

1 A. Not outside what I saw in the job analysis.

2 Q. But you personally didn't conduct a job analysis in
3 any way, shape or form to give your testimony today; is that
4 correct?

15:52:51 5 A. That's correct.

6 Q. So how can you say that the test was not job related?

7 A. I said the job -- did I say the test was not job
8 related? I said the job analysis was insufficient.

9 Q. Well, is it your opinion then that it's not job
10 related since the job analysis wasn't the sufficient?
15:53:11

11 A. The job analysis is not sufficient.

12 Q. So you have not rendered an opinion on whether the
13 test was job related or not; is that correct?

14 A. Given the job analysis is not sufficient, it can't be
15 job related, can't be determined to be job related.
15:53:23

16 Q. In the assessment center that was administered in
17 Akron, we were talking about panel differences. And you
18 told me in Jefferson County you just rotate panels so you
19 never know whether or not there were panel differences; am I
20 correct?
15:53:45

21 A. We rotate to prevent panel differences.

22 Q. So if you keep the same panels, and one panel scores
23 higher than other panels, in the field of industrial
24 psychology, is it not appropriate to standardize those
25 scores?
15:54:09

1 A. Assuming the rates are -- yeah, it's appropriate in
2 some cases.

3 Q. You talked about how you do it in Jefferson County and
4 you talked about preliminary ratings, and then you have a
15:54:22 5 consensus rating; is that correct?

6 A. Yes.

7 Q. When your assessors do these preliminary ratings, I
8 assume that they give numbers to candidates; is that
9 correct?

15:54:32 10 A. Yes.

11 Q. Do you examine the point spreads in those preliminary
12 ratings?

13 A. Yes.

14 Q. Before they do consensus ratings?

15:54:41 15 A. Could you perhaps rephrase the question?

16 Q. Sure. You told me that there were two assessors that
17 you had rate candidates. And they did preliminary ratings
18 before they did a consensus rating; is that correct?

19 A. Yes.

15:55:01 20 Q. And when they preliminarily rate a candidate, do you
21 go in and examine the preliminary ratings to determine if
22 there is too large of a point spread before they reached
23 consensus?

24 A. Perhaps I could reexplain the process.

15:55:24 25 THE COURT: No, sir. I'm sorry. Do you

1 understand the question?

2 THE WITNESS: I can't answer the question as
3 asked.

4 THE COURT: Do you understand the question?

15:55:30 5 THE WITNESS: Yes. It just doesn't make
6 sense --

7 Q. I don't know how else to ask this, Dr. Brink. If you
8 had two assessors that gave preliminary ratings and their
9 preliminary ratings of a candidate were three points, four
10 points a part?
15:55:47

11 A. Right.

12 Q. And then they reached a consensus rating, would you
13 ever go in to the underlying preliminary ratings and
14 determine that their consensus rating was incorrect or
15 unreliable?
15:56:03

16 A. We use the preliminary ratings to calculate
17 reliability. We do examine the ratings.

18 Q. So you look at the preliminary ratings, and regardless
19 of what the point spread is, whether it's two points, three
20 points, you do an overall reliability calculation, don't
21 you?
15:56:18

22 A. Yeah, reliability is based on the preliminary ratings.

23 Q. Do you do reliability calculations after consensus?

24 A. No.

15:56:29 25 Q. If you look at the preliminary ratings and you

1 calculate reliabilities based on those preliminary assessor
2 ratings, what kind of reliabilities are you looking for?

3 A. On dimension ratings?

4 Q. On the preliminary ratings that they give, what are
15:56:49 5 the reliabilities that you're looking for in those
6 assessment center exercises?

7 A. Ideally the dimension ratings would be in the range of
8 .9 to .99. And then 1.0 would be the highest reliability
9 possible much.

10 That would be the highest level to achieve. And
11 anything above .8 would be good. .7, we start to get a
12 little concerned when it gets close to .7. And it's okay
13 to have one or two, I think below .6, but you wouldn't want
14 your entire test or component to have ratings -- excuse me,
15:57:06 15 reliability estimates in dimensions on the range of .6.

16 Q. And in the assessment centers given here for
17 lieutenant and captain, do you know what the reliabilities
18 are?

19 A. We're speaking about dimension reliabilities,
15:57:41 20 component reliabilities?

21 Q. Component reliabilities?

22 A. I believe they were presented in the validation
23 report.

24 Q. Do you know whether they are high enough to be
15:57:54 25 acceptable in your opinion?

1 A. Are we talking about dimension ratings.

2 Q. Exercise?

3 A. I would have to see what they are.

4 Q. Oral boards?

15:58:06 5 THE COURT: I'm sorry.

6 THE WITNESS: I would have to see what the actual
7 numbers were.

8 MS. AMBROSE-RUBRIGHT: I'm going to take a
9 moment, Your Honor.

15:58:14 10 THE COURT: Just so it's clear, ladies and
11 gentlemen, we are adjourning at 4:30 for benefit of this
12 jury. We're not going carry on after 4:30, given the fact
13 that it will be -- again, there will be no day late. The
14 jurors are traveling to their vehicles, and parking decks
15 here in the downtown area. And I already indicated one of
16 our jurors travels more than 100 miles each way to be here.

17 So I would hope that both counsel and the witness are
18 mindful of the fact that this is the schedule we are going
19 to follow.

15:59:32 20 Q. Dr. Brink, let me show you page 40 from the final
21 report of Dr. Jacobs?

22 MR. ELFVIN which exhibit is this, please?

23 MS. AMBROSE-RUBRIGHT: 1016.

24 Q. I'm asking you to look at the statistics that were
16:00:04 25 calculated on interrater agreement for the incident command

1 subordinate conference for group rating. Do you see that
2 for lieutenant, captain?

3 A. Yes.

4 Q. And those numbers .921, .922, .971, .965, are very
16:00:18 5 high reliabilities, are they not, Dr. Brink?

6 A. As I said earlier .9 will be very good.

7 Q. Thank you, Dr. Brink. Dr. Brink, you made a statement
8 that in the written work sample exercise, that you can't
9 understand how oral expression would be assessed is that
16:00:52 10 exercise. Do you recall that statement?

11 A. Yes.

12 Q. I'm going to show you what is in the assessor training
13 manual which is Exhibit 1029. I believe it might be behind
14 you.

16:01:50 15 A. Which binder? Do you know, is it separate?

16 Q. It's a separate binder?

17 THE COURT: 1029?

18 MS. AMBROSE-RUBRIGHT: That's correct. Your
19 Honor, may I approach the witness and help him?

16:02:05 20 THE COURT: Yes, why don't you approach. If not,
21 I'll allow him to use my copy.

22 MS. AMBROSE-RUBRIGHT: That might expedite it.

23 THE COURT: Sir, it's there before you in the
24 bracket binder, the one before you on the podium, just
16:02:27 25 handed to you sir. You can use my copy. Thank you.

1 THE WITNESS: Thanks.

2 Q. I'm on page 25 of that exhibit, Doctor.

3 Did you see this confidential appendix which was the
4 training manual for the assessors before today?

16:02:59 5 A. I've seen the appendices. I don't know about every
6 page, they're very, very thick.

7 Q. If you would look at page 25 under the written work
8 sample. Do you see the list of abilities and the X's?

9 A. Yes.

16:03:19 10 Q. On which abilities are measured in certain exercises
11 and which are not?

12 A. Yes.

13 Q. What would you take NA to mean?

14 THE COURT: You're going to need to blow that up
16:03:29 15 for the jurors. I can tell they're not going to be able to
16 read it. Can you read it, ladies and gentlemen? I didn't
17 think so.

18
19 MS. AMBROSE-RUBRIGHT: That's as far as it will
16:03:39 20 zoom in, Your Honor.

21 No, it's not.

22 Q. Do you see that, Dr. Brink?

23 A. Yes.

24 Q. And what does NA mean to you?

16:03:48 25 A. Not applicable.

1 Q. Would you take that to mean that oral expression was
2 not assessed in the written work sample?

3 A. That -- yeah.

4 MS. AMBROSE-RUBRIGHT: I just need one moment,
16:04:10 5 Your Honor.

6 No further questions.

7 THE COURT: All right. Thank you. Any redirect
8 of this witness? All right. Counsel, you may proceed.

9 REDIRECT EXAMINATION OF KYLE BRINK

16:04:29 10 BY MR. THOMPSON:

11 Q. Dr. Brink, you were testifying just a few minutes ago
12 about how you calculated reliability based on the
13 preliminary assessment; is that correct?

14 A. Yes.

16:05:12 15 Q. Are you aware of -- and you saw this information put
16 up here where counsel said look at this reliability number
17 and how fabulous it is, do you see that there, this 92, and
18 971, do you know how that was computed?

19 A. No, I do not.

16:05:30 20 Q. Here is also from the final report, and this is the
21 final eligibility list. Do you see that number right there,
22 that 42.381. These are the scores after they had been
23 standardized?

24 MS. AMBROSE-RUBRIGHT: Could you give us an
16:05:43 25 exhibit number, please, counsel.

1 THE COURT: One moment being please.

2 MS. AMBROSE-RUBRIGHT: The exhibit number.

3 THE COURT: Why don't you pull it down, perhaps
4 in the interest of time, hand it to opposing counsel and let
16:05:52 5 her look at it.

6 Q. Exhibit 169?

7 THE COURT: Are you ready, counsel? Go ahead.
8 You may proceed.

9 Q. On Exhibit 1016, do you see the oral board says 42381?

16:06:24 10 A. Yes.

11 Q. Then you see on the reliability computations used by
12 Dr. Jacobs, do you see it also here we highlighted it for
13 you, 42381?

14 A. Yes.

16:06:35 15 Q. So Dr. Jacobs was computing reliability after --

16 MS. AMBROSE-RUBRIGHT: Objection. He said he
17 didn't know.

18 THE COURT: Sustained, ladies and gentlemen of
19 the jury, disregard counsel's question. Nonleading
16:06:44 20 questions, sir.

21 Q. What does this tell you -- thank you, Your Honor.

22 What does this tell you about how Dr. Jacobs computed
23 these reliability numbers?

24 MS. AMBROSE-RUBRIGHT: Objection. He just said
16:06:53 25 he don't know.

1 THE COURT: It's overruled. He can -- ladies and
2 gentlemen of the jury, again, your collective minds and
3 memories of what this witness may have earlier testified to,
4 you can rely upon that in deciding this particular issue.
16:07:08 5 Go ahead. You can answer the question, sir.

6 Again, what his earlier testimony may have been, you
7 will have to recall. Thank you.

8 A. Would you please restate the question?

9 Q. Sure. The oral scores that appear on this Exhibit
16:07:31 10 1016, sir?

11 A. Yes.

12 Q. Are these the scores after they've been standardized
13 and Z scored?

14 A. There was two standardization processes so I can't
16:07:53 15 answer that question.

16 Q. Okay. And the first standardization process was when?

17 A. Well, we talked about earlier the standardized, based
18 on the panels themselves, but they also standardized scores
19 when they were calculating overall test scores.

16:08:11 20 Q. And when there is standardization is that what is
21 known as Z score?

22 A. One type of standardized score would be a Z score.

23 Q. In these tables for the final eligibility list from
24 the City of Akron Division of Fire promotional examination,
16:08:29 25 sir, the final eligibility list was determined after all

1 these standardizations were done?

2 A. That's correct.

3 Q. So these scores that are reflected here are after all
4 the standardization, the first time for panel differences,
16:08:46 5 and the next time based on total scores, how that was done?

6 MS. AMBROSE-RUBRIGHT: Objection.

7 THE COURT: Sustained. Nonleading questions,
8 sir. It is redirect.

9 MR. THOMPSON: Okay.

16:08:58 10 Q. So the final eligibility list, based on the final
11 report and the data provided to you was after the
12 standardization was done?

13 A. The final score?

14 Q. Yeah.

16:09:15 15 A. The final score was after all the standardization was
16 done.

17 Q. And is that reflected in this table here from
18 Defendant's Exhibit 1016? These are the final scores used
19 to rank order?

16:09:26 20 A. Yeah, the final score would be on the final SCR
21 column.

22 Q. Okay. And is that the score that appears here in the
23 final report on page 41, Dr. Jacobs, when he's computing his
24 reliability statistic?

16:09:48 25 A. The highlighted value?

1 Q. Yes.

2 A. That's the final score in the oral component.

3 Q. Okay. Good.

4 And the last table that was put up before you, sir,

16:10:01 5 was one where it said there were certain behaviors that were
6 not assessed. Do you recall that?

7 A. Repeat the question, please.

8 Q. Sure. Do we have that? 1029?

9 On page 25, Exhibit 1029?

16:10:25 10 A. Okay.

11 Q. I'm trying to do this as quickly as I can. This one,
12 do you remember this?

13 A. Yes.

14 Q. I'm going to show you --

16:10:37 15 MR. THOMPSON: Again, Your Honor, this is one the
16 consolidation rating forms that we published earlier. We
17 would like to use this for expediency purposes?

18 THE COURT: Put it up.

19 Q. This is called lieutenant written work sample
16:10:49 20 consolidation rating form. And what's the very first
21 dimension that's being evaluated there?

22 A. If you can move a little to the right.

23 Q. Sorry. This is Exhibit 78-16?

24 A. Oral expression.

16:11:00 25 Q. And this is on the written work sample consolidation

1 rating form, sir?

2 A. Yes.

3 Q. And this has a rating number across the top there,
4 sir, or a number, 7?

16:11:17 5 A. Yes.

6 Q. Doctor --

7 MR. THOMPSON: Can I approach, please, Your
8 Honor, to gets the vitae that was provided to you?

9 THE COURT: You may.

16:11:44 10 Q. If I could take that from you for a minute, please,
11 Dr. Brink. Dr. Brink, the curriculum vitae that was put to
12 you earlier, do you remember this?

13 A. Yes.

14 Q. And the question was asked to you about whether you
16:12:05 15 put that one analysis in your C.V.? I'm going to direct
16 your attention right here.

17 A. Yes.

18 Q. Is that the study that questions were asked of you on
19 cross-examination?

16:12:24 20 A. Yes, it is.

21 Q. So it is on your vitae?

22 A. Yes.

23 Q. I want to make sure that we have this right. The
24 assessment centers in Jefferson County are videotaped?

16:12:40 25 A. Yes.

1 MS. AMBROSE-RUBRIGHT: Objection.

2 THE COURT: It's overruled. I think he already
3 testified to it, but it's overruled. I'll let counsel ask
4 the question. Go ahead.

16:12:49 5 Q. And, Dr. Brink, at any time in any of Dr. Jacobs'
6 data, did you ever advise you or did he provide any
7 information on to who assessor 99 was for the written work
8 sample?

9 A. I don't recall whether I was provided, but assessor 99
16:13:09 10 was an E.B. Jacobs employee.

11 Q. Employee of E.B. Jacobs?

12 A. Yes.

13 Q. Was not a fire officer?

14 MS. AMBROSE-RUBRIGHT: Objection.

16:13:17 15 THE COURT: Overruled.

16 A. All I know it was an employee of E.B.J., I'm not sure
17 what that person's background was.

18 Q. And according to the final report of Dr. Jacobs, do
19 you know when the final weighting scheme was established for
16:13:30 20 these examinations?

21 A. The final weighting scheme was established by E.B.J.
22 based on the three --

23 THE COURT: The question was when? I'm trying to
24 assist the proceeding. The question was when.

16:13:46 25 A. Oh, when?

1 Q. When, yes?

2 A. When.

3 Q. Yeah, when the weighting scheme that was used by E.B.
4 Jacobs was decided?

16:13:53 5 A. The weighting scheme was decided after the job
6 analysis and before the test was developed.

7 Q. And on cross-examination you were asked questions
8 about the job analysis. Do you remember the just Yusko
9 group?

16:14:09 10 A. Yes.

11 Q. And the job analysis that the Yusko group did in 2003,
12 briefly, how thorough was that job analysis?

13 A. It would have followed the procedures that I described
14 much earlier today with site observations, focus groups and
16:14:25 15 job analysis questionnaires.

16 Q. Did you ever see any prior job analysis that was done
17 prior to the 2004 job analysis in this case?

18 A. No.

19 Q. And a lot of questions were asked on
16:14:41 20 cross-examination, Doctor, about did you ask Dr. Jacobs for
21 anymore information. Do you remember that?

22 A. Yes.

23 Q. According to the SIOP principles and the uniform
24 guidelines, the documentation that you were referring to, is
16:14:54 25 that documentation that's only to be produced upon request

1 of a third party?

2 A. No.

3 Q. When is it supposed to be produced?

4 A. At the time of the validation of the report.

16:15:05 5 Q. So if I understand you correctly, like when you're
6 doing your own, you don't just put together a bare bones
7 validation report and wait for somebody to ask for more
8 information?

9 MS. AMBROSE-RUBRIGHT: Objection.

16:15:15 10 THE COURT: Sustained. Disregard the question,
11 ladies and gentlemen.

12 Q. And the questions were asked relating to determination
13 of adverse impact, and you were asked if you'd ever computed
14 adverse impact relating to age. Do you remember that
16:15:35 15 question being asked of you on cross?

16 A. Yes.

17 Q. Are there rules for determining adverse impact for age
18 different from the rules for determining adverse impact for
19 race?

16:15:45 20 A. It's the same calculation regardless of what group
21 you're looking at.

22 Q. And you testified on cross-examination about mean
23 differences, do you remember that testimony?

24 A. Yes.

16:15:53 25 Q. And you said that you used it for minimum standards.

1 Or the testimony you gave was as to minimum standards. Put
2 it in context. When you're measuring for minimum standards,
3 how is that different from what is being done here?

4 A. I think they're referring to minimum qualifications.

16:16:14 5 Q. Minimum qualifications. I'm sorry.

6 A. That is the term we use. Minimum qualifications in
7 the context of validation report would have been whether or
8 not the applicants met the time and service requirements.

9 And it was a pass or fail test. There was no rank. Did
16:16:37 10 they have the time and service requirements or not.

11 Q. So that's much different than the examinations we have
12 here?

13 A. Yes.

14 Q. So does that analysis that counsel pointed to and
16:16:45 15 pointed out, is that even pertinent to the issues -- issue
16 in this case?

17 MS. AMBROSE-RUBRIGHT: Objection.

18 THE COURT: Sustained as to the -- yes, do you
19 want to rephrase the question.

16:16:54 20 Q. Sure.

21 Is that kind of analysis even applicable to the issues
22 of promotion in this case?

23 A. No.

24 Q. And when you were asked questions about power,
16:17:06 25 remember the power analysis?

1 A. Yes.

2 Q. And power goes -- if I understood your testimony, to
3 what type of statistical test you can use or should rely
4 upon?

16:17:18 5 A. Repeat the question.

6 Q. Sure. Power analysis goes to how reliable the
7 statistic is that you are using?

8 A. Yes.

9 Q. And if I understand your testimony, those statistics
16:17:36 10 of low power are statistics that you should not use in
11 making decisions?

12 A. That's correct.

13 Q. And these statistics have low power?

14 A. That's correct.

16:17:43 15 MS. AMBROSE-RUBRIGHT: Objection.

16 THE COURT: That's his opinion. It's overruled.

17 Q. And when you're dealing with the assessor ratings down
18 in Jefferson County when you're doing it where you have the
19 preliminary assessment ratings, those things, these
16:18:05 20 assessors are working off of videotaped presentations?

21 A. Yes.

22 Q. So they can go back and review those presentations as
23 many times as necessary to resolve any issues?

24 A. Yes.

16:18:16 25 Q. Is that possible to do anywhere with the oral

1 assessment exercises in this case?

2 A. No.

3 MR. THOMPSON: If I could have a minute, please,
4 Your Honor?

16:18:28 5 THE COURT: You may.

6 Q. Dr. Brink, relating to the job analysis that was done
7 by Yusko, did you have all that data when you just did the
8 follow-up job analysis, I guess, just a few years later?

9 A. We had the data from the 2003 analysis on hand.

16:19:13 10 Q. So you could determine how detailed and how thorough
11 that job analysis was at that time then?

12 A. Yes.

13 Q. And there were a lot of questions asked about adverse
14 impact on cross-examination. Your opinion is there is
16:19:32 15 adverse impact on -- for -- against African-Americans at the
16 lieutenant rank?

17 A. Yes.

18 Q. And your opinion is, sir, that there is adverse impact
19 against Caucasian firefighters at the rank of captain?

16:19:45 20 MS. AMBROSE-RUBRIGHT: Objection, Your Honor.
21 He's already given that opinion.

22 THE COURT: I'll let him summarize his opinion
23 just finally in the interest of time. Go ahead.

24 A. Yes.

16:19:52 25 Q. And your opinion is that there is adverse impact

1 against those firefighters over the age of 40 at the
2 lieutenant rank?

3 A. Yes.

4 Q. So going into the job analysis in all this detail, in
16:20:07 5 light of those facts, is appropriate then?

6 MS. AMBROSE-RUBRIGHT: Objection.

7 THE COURT: Sustained.

8 Excuse me. I apologize, ladies and gentlemen. I'll
9 allow the question based upon the earlier testimony. You
16:20:22 10 can ask the question, sir. I think it's -- yeah. It ties
11 into what the opinion witness's opinion is. Go ahead. You
12 can ask the question one more time. My apologies.

13 Q. Then under these circumstances where there is a
14 determination you made of adverse impact, it is appropriate
16:20:40 15 to go into the job analysis and the test development and
16 actually dissect this test from start to finish then?

17 A. It would actually be required by the uniform
18 guidelines, so yes.

19 Q. Required to do so?

16:20:51 20 A. Not just appropriate, but required according to
21 uniform guidelines.

22 Q. And your testimony was, I think on cross-examination,
23 that adverse impact cannot be computed as to the test in
24 whole until all the promotions have been made.

16:21:04 25 A. That's correct.

1 Q. Is there any way that Dr. Jacobs could have expressed
2 an opinion as to adverse impact prior to the completion of
3 the promotion process?

4 MS. AMBROSE-RUBRIGHT: Objection.

16:21:20 5 THE COURT: Well, all right. Go ahead. You can
6 render an opinion, sir.

7 A. No.

8 Q. Are you aware that that's exactly what he did in his
9 final report?

16:21:31 10 MS. AMBROSE-RUBRIGHT: Objection.

11 THE COURT: It's overruled. Do you recall?

12 Q. You can go to his report. I think it's 1029, page 44.

13 A. He said there was no adverse impact at any rank on any
14 of the exams.

16:21:47 15 Q. That's fine. No further questions?

16 THE COURT: Any redirect of this witness -- I'm
17 sorry, recross. My apologies.

18 RECROSS-EXAMINATION OF KYLE BRINK

19 BY MS. AMBROSE-RUBRIGHT:

16:21:58 20 Q. You said you were familiar with uniform guidelines, am
21 I correct?

22 A. Yes.

23 THE COURT: A little louder, counsel.

24 Q. Is there any requirement in the uniform guidelines
16:22:06 25 that you video or audiotape assessment center exercises?

1 A. No.

2 Q. You also said you were familiar with the uniform
3 guidelines, and I assume the questions and answers that
4 accompany the uniform guidelines?

16:22:18 5 A. Yes.

6 Q. In the questions and answers, are you familiar with
7 the fact that there is a requirement to consider
8 alternatives but not document them?

9 A. Are you asking it's not a requirement to document?

16:22:36 10 Q. How about if I do it this way? I'm showing you what's
11 marked as Defendant's Exhibit 1068-16 from the uniform
12 guidelines. You are familiar with the questions and answers
13 that accompany the guidelines?

14 A. Yes.

16:23:04 15 Q. And in question 52, they're asking whether the
16 guidelines require consideration of alternative procedures
17 and alternative methods. Do you see that question.

18 A. Yes.

19 Q. Is there anywhere in there that they discuss that the
16:23:20 20 consideration by the test developer has to be documented in
21 a final report? Do you see that anywhere there?

22 A. Would it be okay if I read my copy? It's very
23 difficult for me to read the screen. Do you have another
24 copy?

16:23:36 25 Q. How about if I just give you my copy?

1 A. That would be fine.

2 MS. AMBROSE-RUBRIGHT: Could I approach, Your
3 Honor?

4 THE COURT: Yes, you may.

16:24:01 5 A. In this question and answer it does not say that it
6 has to be documented.

7 Q. Thank you, Dr. Brink, I have no other questions?

8 THE COURT: All right, Doctor. You may step
9 down, sir. You're excused.

16:24:12 10 MR. THOMPSON: Your Honor, I have one discretion.

11 THE COURT: One question. The recross was
12 extremely brief so I expect this to be very brief, please.

13 FURTHER REDIRECT EXAMINATION OF KYLE BRINK

14 BY MR. THOMPSON:

16:24:23 15 Q. The SIOP, page 50? Do you have that there?

16 A. Yes, I do.

17 Q. Go to page 50. These are the SIOP principles, sir?

18 A. Yes.

19 Q. Would you read to the jury as to alternative measures
16:24:38 20 what the Society of Industrial Organizational Psychology of
21 which Dr. Jeanneret is a fellow says about documentation?

22 A. The heading is search for alternative selection
23 procedures, and it says underneath that heading. The
24 researcher should document any search for selection
16:24:55 25 procedures, including alternative combinations of these

1 procedures that are substantially equally valid and reduce
2 subgroup differences.

3 MR. THOMPSON: Thank you. No further questions.

4 THE COURT: Please read back the last answer.

16:25:15 5 A. The research should document any search for collection
6 procedures, including alternative combinations of these
7 procedures that are substantially equally valid and reduce
8 subgroup differences.

9 THE COURT: All right. Thank you, Doctor.

16:25:32 10 Ladies and gentlemen of the jury, I'm going to -- I'm
11 going to adjourn for the day. A couple things.

12 First of all, leave your notepads on your chairs.
13 Remember the admonitions I've given you. During the evening
14 you're not to discuss the case among yourselves or with
16:25:46 15 anyone else. Advise your family and friends of this
16 instruction.

17 Until the case has been completed, your verdict
18 rendered, you're simply not to discuss this case. Do not
19 attempt to obtain in additional information regarding any of
16:25:57 20 the issues in this case on the internet or any Web sites
21 that may have been referenced here today. None of that is
22 appropriate for your consideration.

23 Also being ladies and gentlemen, do not have any
24 contact with any individual who has anything -- in any way
16:26:12 25 shape or form touches about this case. I'm going to ask you

1 to remain in the jury room for just a few minutes so I can
2 consult with counsel and see how we're going to proceed
3 tomorrow, being it may have some bearing on the balance of
4 our schedule this week.

16:26:24 5 I know at least one of my -- excuse me. One of our
6 jurors has an issue regarding next week. I'm mindful of
7 that. It will be -- you will be -- your concerns and your
8 matter will be addressed. We will adjust our schedule to
9 meet your family matter and needs in that regard.

16:26:39 10 So just give me about five minutes, ladies and
11 gentlemen, and the clerk will come back and speak with you
12 regarding when we will need for you to report tomorrow, and
13 maybe give you some further guidance as to how we're going
14 proceed.

16:26:50 15 Thank you very much, ladies and gentlemen.

16 Mr. Hink.

17 THE DEPUTY CLERK: All rise.

18 (Jury out, 4:25.)

19 THE COURT: All right, ladies and gentlemen, who
16:27:21 20 do the plaintiffs intend on calling?

21 MR. THOMPSON: Tomorrow, Your Honor.

22 THE COURT: You can -- you'll all be seated if
23 you would like, please. Thank you.

24 MR. THOMPSON: Your Honor, tomorrow we plan on
16:27:39 25 calling several of the remaining plaintiffs, that would

1 include Bruce Clough, that would include Brian rocks son,
2 David O'Neal, we plan on starting with Bradley Carr. And we
3 would like to have Bruce Miller here tomorrow and if we have
4 any other witnesses that are out there as far as
16:27:59 5 follow-up-type witnesses we expect to try and work through
6 those very expeditiously tomorrow.

7 We have also advised the Court that we are planning on
8 reading the deposition of Steve nutting and chief Jim Clack
9 into the record on Friday. We have conferred with counsel
16:28:15 10 already, many of the objections have been addressed. There
11 are some for the Court to consider. I will have those for
12 the Court tomorrow morning so it can look at those much
13 those depositions are not very long, and it will not require
14 an inordinate amount of time to go through those. But most
16:28:31 15 of the objections have been dealt with between the parties
16 already. So I expect to have that in your hands tomorrow
17 morning so you can review those.

18 THE COURT: How many remaining plaintiffs do you
19 have?

16:28:40 20 MR. THOMPSON: I believe we have seven or eight
21 of the original plaintiffs in there. Ruth Miller would be
22 another. We would expect Chief Green would be available to
23 us on Friday. Bradley Carr and Greg Snyder will probably be
24 the longest witnesses of the remaining plaintiffs.

16:28:56 25 I assume that Brad Carr will start tomorrow afternoon

1 and probably will not be done with him by the end of the day
2 tomorrow.

3 But we expect to start with him anyway. We should
4 hopefully be through most of our witnesses by the close of
16:29:08 5 the day Friday. We expect to be at that point by the end of
6 the day Friday.

7 THE COURT: All right. Counsel for the
8 defendants, will you be ready -- let me just share with both
9 sides what I'm contemplating given the pace that we've been
16:29:25 10 moving, I am contemplating proceeding on Saturday. There is
11 certain logistical problems that that poses, but I've asked
12 my clerk to confer with the powers that be, and it is
13 possible that we can proceed on Saturday. And that's what
14 I'm contemplating doing, given the pace that we're
16:29:50 15 proceeding and given some of the challenges we've had to
16 face. And I'm going ask the clerk to confer with the
17 jurors. I'll perhaps confer with them tomorrow. We have
18 one juror, if you recall, who has a husband who is having
19 surgery on December 16.

16:30:09 20 I suspect we do not know as of yet. We hope to know
21 soon the time that surgery is scheduled. I suspect she is
22 are going to be probably lost to us if the surgery is early
23 morning until such time as he is out of recovery. We may or
24 may not be able to go forward at all on the 16th, and I
16:30:29 25 admitted to her and we discussed it during voir dire the

1 fact that her husband was having the surgery.

2 So I'm just advising you now that we may very well go
3 forward this Saturday and, if necessary, Saturday the 20th.
4 So that this case could be completed in a timely fashion.

16:30:45 5 So you should adjust your schedules, make sure your
6 witnesses are available. I haven't made a final decision in
7 that regard. But if we are not through with the plaintiffs'
8 witnesses by the close of business on Friday, my intention
9 is at least at this time to go forward on Saturday. So that
16:31:02 10 whatever we have to deal with, procedural issues on
11 Saturday, whether it be motion practice, etcetera or
12 finalizing the testimony. That is what I'm considering.

13 Counsel for the defendant, you can be heard, and then
14 I'll allow plaintiff again to be heard again after having
16:31:19 15 heard the witnesses that are going to testify.

16 Before we do that, Mr. Hink, let the jurors know they
17 can go home. We will see them tomorrow morning at 9:00.
18 Thank you.

19 Give them my apologies for the delay.

16:31:32 20 What is the defendant's position, please.

21 MS. AMBROSE-RUBRIGHT: Your Honor, with regard to
22 Mr. Nutting and Mr. Clack, as we already indicated to the
23 Court, we object to having the depositions read in their
24 entirety. I indicated that to Mr. Thompson. We did go over
16:31:47 25 potential objections. And I would like to indicate to the

1 Court that I would like to withdraw my cross-examination of
2 both witnesses so that testimony should be very short, the
3 direct testimony of Mr. Thompson.

4 THE COURT: I've already ruled that I would allow
16:32:01 5 the testimony, so I'll note your exception. And I will read
6 it, but I don't think I'm likely to revisit my earlier
7 ruling. Based on my earlier ruling, I suspect the
8 depositions may be read.

9 With regard to any other evidentiary issues that I
16:32:20 10 have to deal with before we adjourn this afternoon any other
11 issues before we conclude the day?

12 MR. ELFVIN: No evidentiary issues, Your Honor.
13 I happen to be the chairman and district master of a Swedish
14 organization and Saturday the 13th is the annual Lucia
16:32:37 15 Celebration, so I need to make arrangements for Saturday to
16 have somebody else cover for me.

17 THE COURT: Well, I suppose at this time I'm
18 going to confer with the jurors. I may or may not know,
19 sir. I apologize for the late notice, but we may not know
16:32:52 20 until as late as Friday, Friday morning.

21 MR. ELFVIN: I just wanted to advise the Court.

22 THE COURT: Friday morning is when I have to make
23 the final determination so I'm sure all of our schedules may
24 be impacted by if we have to go forward, on Saturday -- we
16:33:06 25 all have, I'm sure, commitments, conflicts, that might be

1 affected. But this case and resolution of same takes
2 precedence over those other commitments. Myself included.

3 Now, beyond that, at the close of business yesterday
4 there had been some discussion of possible resolution of
16:33:25 5 this case.

6 There has been -- I would reluctantly say at least
7 there has been a fair amount of the plaintiff's case
8 presented, including two very important witnesses, I'm sure,
9 two experts have testified. I would hope, at this point in
16:33:40 10 the proceedings, each side would now have a better, at least
11 each side, both sides would have a better view of the
12 strengths and weaknesses of their case, their claims, and
13 the risk of this ongoing litigation.

14 As I said to counsel privately last night, this is a
16:33:58 15 piece of litigation which ultimately -- and I just -- let me
16 preface my remarks by saying nothing I say should be taken
17 as my view as to what the verdict in this case should be or
18 may be or what my view of the case is. It should not be
19 taken by either side as that.

16:34:19 20 I'm not going to make the ultimate decision here, and
21 perhaps I will, but the jury will make a determination and a
22 finding as to the most important issues in this case.

23 But all that being said, this litigation, it strikes
24 me, whoever prevails, this is still going to be a no win
16:34:36 25 proposition for both sides. It is going to lead to, no

1 matter who prevails, it is not going resolve the ongoing and
2 outstanding issues that have been highlighted in this Court.
3 So what I am suggesting to the parties is an encouragement,
4 trying to encourage both sides to keep an open mind and
16:34:59 5 explore some possible way of resolving this case.

6 As I've shared with the other side, or with both sides
7 in this case, the remedy, should the plaintiffs prevail,
8 what the remedy may be, how it would be implemented is a
9 matter of debate, whether it would bring to the plaintiffs
16:35:19 10 all that they wish from this litigation, again, is a matter
11 of debate and yet to be determined.

12 Conversely, from the defendant's perspective, there
13 has been substantial evidence presented here. I think it's
14 fair to say -- that would, again, would support the
16:35:37 15 proposition that the examination -- and again I -- I offer
16 no opinion, but there has been substantial testimony as to
17 the -- what the plaintiffs believe is a substantial
18 weaknesses in the exam, and how it was presented. What
19 jurors are going to do with this information and how they're
16:35:57 20 going to view it, again, I'm not going to speculate.

21 But irrespective of the outcome in this case,
22 irrespective of the verdict, it will not end here, when the
23 jurors render their verdict. It will not end because there
24 will be an appeal by either side or both sides. Both sides
16:36:16 25 can appeal the verdict.

1 That appeal will last two or three or four years
2 potentially. The verdict could be affirmed, it could be
3 reversed, it could be affirmed in part, reversed in part.

4 I could be faced with making a determination as to one
16:36:34 5 part of the case, be it race. I could be faced with a
6 determination as to age, one to the exclusion of the other.

7 So I don't see, ladies and gentlemen, a winner in this
8 litigation ultimately. A verdict in favor of one side or
9 the other doesn't equal a victory in my humble opinion.

16:36:54 10 So there has been -- I've been made aware of some of
11 the negotiations here. It appears there has been
12 considerable movement, at least in my humble opinion,
13 knowing what I know about the case and the history of same,
14 movement by both sides. And there seems to be one
16:37:15 15 remaining -- I guess I'll say valley or chasm that cannot be
16 bridged. And I would encourage you to see whether or not,
17 in light of today's testimony whether or not that gap could
18 not be closed or that -- however, whatever analogy you want
19 to use. Because otherwise, everyone may leave here unhappy
16:37:39 20 in a week or two. And everyone may leave here, I am sure
21 everyone will leave here, I think, with the issues in this
22 case still yet resolved, or unresolved because of the
23 appellate process and just the complex nature of this case
24 and the decision we're asking these eight jurors to make.

16:38:01 25 So you've all heard the testimony. I think the

1 testimony today -- and I'm not commenting this in this
2 fashion to say that it favors one side or the other. But it
3 just gives you some perspective about how challenging these
4 issues are. And if you don't, both sides now, sit down and
16:38:22 5 reevaluate where you are and what you can do to remedy some
6 of the unhappiness with the past, but yet also with an eye
7 towards what you can do to plan for the future, which the
8 future is -- everyone here is still, in my humble opinion,
9 keeping in mind what I know about age, the years of service,
16:38:47 10 etcetera, relatively speaking, everyone here still many more
11 years or a number of years more yet to work in this
12 department, and to coexist with their employees.

13 So if you don't make the time now and make a genuine
14 effort, then it's going to continue. This thing is going to
16:39:06 15 continue to be difficult and unresolved.

16 And I'll make myself available here this afternoon to
17 try to, again, work with the parties, to accommodate some
18 compromise. And we've talked about it yesterday. We sort
19 of put in place some general -- we talked about some general
16:39:25 20 concepts. And so, if you now -- now is the time, ladies and
21 gentlemen.

22 And I apologize, but I have an obligation also to
23 these jurors. I can't take another morning -- I can't take
24 another day and say, okay, don't come in until 10:30,
16:39:43 25 because when I do that that pushes back this schedule. That

1 pushes us into the holiday week and these jurors will not,
2 fairly -- I shouldn't say not fairly, they're less likely,
3 perhaps, to give this matter all the attention it deserves
4 because of, again, their own personal -- just their own
16:40:01 5 personal obligations.

6 So now is the time, ladies and gentlemen. Take this
7 time to work through and discuss resolution of this case.
8 Otherwise, I cannot break this trial tomorrow. We'll go
9 forward tomorrow with the testimony. And whatever bridges
16:40:22 10 us -- whatever happens after tomorrow, where that bridges
11 us, we'll go through Friday, if need be, and then
12 potentially Saturday, as much as I am reluctant to do it,
13 this Court will incur extra costs, and that will be taxed to
14 the cost of this proceeding.

16:40:39 15 So whoever loses in this case, potentially, and
16 ultimately, may be responsible for all those costs, in
17 addition to all the other costs of this litigation.

18 So I know I'm rambling a bit. I apologize if it
19 sounds like I'm lecturing, but I'm giving you my hope and my
16:40:59 20 honest belief, after having read all the record in the case,
21 the depositions, and rereading them.

22 There will be no winners, folks. So take some time,
23 and try to see if you cannot bridge your differences and
24 reach an accommodation, address the past grievances and look
16:41:21 25 to the future. If you want to make use of separate rooms,

1 we can accommodate you in that regard so we understand each
2 other I'll say until 6:00, unless I am apprised that the
3 parties are making some substantial steps or substantial
4 movement.

16:41:41 5 Because I have obligations to security here in the
6 building and closing the building, and again, there is other
7 logistical issues in keeping the building open late that
8 creates.

9 But I'm willing to do that. Does either side have any
16:41:58 10 questions, counsel for the plaintiff, please?

11 MR. ELFVIN: Just to follow up previously, Your
12 Honor, we have continued having what I can say small
13 discussions even during today. We will take advantage of
14 the opportunity to continue any discussions that we can. We
16:42:14 15 do understand there is a problem in the sense that I
16 understand the mayor is sick and unavailable to be brought
17 into the -- what I call the loop of this discussion. That's
18 my only concern.

19 THE COURT: I don't want to be harsh, counsel for
16:42:28 20 the defendant, but this is an important piece of litigation.
21 Now, we're all ill -- I mean people are ill from time to
22 time, and I'm sorry, this sounds a bit harsh, but if he
23 can't pick up the phone, given the importance of this to the
24 city and everybody involved here, you should be able to get
16:42:43 25 ahold of him by telephone.

1 I don't want to pry into his condition. Pick up the
2 phone and say look, this is an important piece of
3 litigation. You need to give us, if you're available, your
4 attention for five or ten or 15 minutes to talk about this
16:42:56 5 matter.

6 MS. AMBROSE-RUBRIGHT: We have already made an
7 attempt.

8 THE COURT: Because otherwise, the other option I
9 have is potentially to call this matter -- complete this
16:43:05 10 matter Thursday, Friday, schedule a settlement conference on
11 Saturday morning and require him to be here. If he is the
12 person with authority, maybe he needs to be here in federal
13 court on Saturday to sit down with all these parties and
14 talk about resolving the case. So hopefully, whatever the
16:43:22 15 condition may be, you don't have to tell me that, but
16 hopefully, he will have addressed it and perhaps recovered
17 sufficiently to help you help these parties.

18 So I'm not telling you what I'm going to do. But if I
19 have to, in addition to going forward on Saturday, if the
16:43:40 20 parties are willing, I may convene a settlement conference
21 on Saturday and require parties with authority to be here
22 whether that be the mayor or whoever. So take some time
23 now. Try to address it. Thank you very much.

24 THE DEPUTY CLERK: All rise.

25 (Proceedings concluded at 4:45 p.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

DIRECT EXAMINATION OF KYLE BRINK	1138
BY MR. THOMPSON	
VOIR DIRE EXAMINATION OF KYLE E. BRINK	1176
BY MR. THOMPSON	
VOIR DIRE EXAMINATION OF KYLE E. BRINK	1180
BY MR. AMBROSE-RUBRIGHT	
CROSS-EXAMINATION OF KYLE BRINK	1251
BY MS. AMBROSE-RUBRIGHT	
REDIRECT EXAMINATION OF KYLE BRINK	1295
BY MR. THOMPSON	
RECROSS-EXAMINATION OF KYLE BRINK	1308
BY MS. AMBROSE-RUBRIGHT	
FURTHER REDIRECT EXAMINATION OF KYLE BRINK	1310
BY MR. THOMPSON	

C E R T I F I C A T E

I certify that the forgoing is a correct transcript from the record of proceedings in the above-entitled matter.

S/Caroline Mahnke

Caroline Mahnke, RMR, CRR

Date 12-10-08

S/Lori A. Callahan

Lori A. Callahan, RMR, CRR

Date 12-10-08